IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-39

WILLIAM PINKUS, doing business as "ROSSLYN NEWS COMPANY" and "KAMERA,"

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case. That judgment affirmed petitioner's conviction in the District Court for the Central District of California on eleven counts of mailing obscene material in violation of 18 U.S.C. §1461.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is

reported at 551 F.2d 1155 (9th Cir. 1977), and is set forth in the Appendix, infra, p. 2a . No opinion was delivered in the District Court

JURISDICTION

The opinion of the Court of Appeals affirming petitioner's conviction was filed on April 7, 1977, and the judgment below was entered on that date. Appendix, infra, p. 2a . Petitioner filed a petition for rehearing with a suggestion for rehearing in banc on May 2, 1977. On June 6, 1977, the Court below denied the petition for rehearing and rejected the suggestion for rehearing in banc. Appendix, infra, p. 1a .

This petition seeks review of the judgment of a United States Court of Appeals in a criminal case. This Court has jurisdiction to grant this petition under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I.

In a federal prosecution for mailing allegedly obscene materials, where it was stipulated that the materials were not mailed to children, and that children were not involved in the case, did the District Court's jury instruction that children were to be considered as part of the community whose standards were to be applied in determining whether the materials were obscene contravene the First Amendment and constitute error?

II.

In a federal prosecution for mailing allegedly obscene materials, where there was no evidence that the materials were mailed to especially sensitive persons, did the District Court's jury instruction that sensitive persons were included in the community whose standards were to be applied in determining whether the materials were obscene contravene the First Amendment and constitute error?

III.

In a federal prosecution for mailing allegedly obscene materials, where the Court of Appeals, in reviewing petitioner's conviction, determined that two motion pictures offered as comparison evidence and excluded by the District Court bore a reasonable resemblance to the motion picture film which was the subject of one of several counts of the indictment, and where the record demonstrated massive public acceptance of the two films, (i) did the Court of Appeals err in refusing to review the exclusion of the comparison evidence in reliance upon the concurrent sentence doctrine; and (ii) where the defense adduced uncontradicted evidence that two motion pictures had received massive public acceptance within the community, and offered proof that these two films were comparable to the allegedly obscene materials, did the refusal of the District Court to permit the jury to review the films constitute error?

IV.

In a federal prosecution for mailing

allegedly obscene materials, where the record contained no evidence that the material was designed for or disseminated to any clearly defined deviant group, (i) did the District Court err in instructing the jury that it could consider the appeal of the material to the prurient interest of members of a deviant sexual group, and (ii) did the District Court err in instructing the jury that it could consider the appeal of such material to members of a deviant group without regard to whether the material was "designed for and primarily disseminated to a clearly defined deviant sexual group?"

V.

In a federal prosecution for mailing allegedly obscene materials, where there was no evidence as to the setting in which the materials were presented, or as to their manner of distribution, circumstances of production, sale or advertising, except the allegedly obscene ads and brochures themselves and the occupations of the recipients, did the Court below err (i) in instructing the jury that it could consider pandering in determining whether the materials were obscene, and (ii) in specifically instructing the jury that it could consider the setting in which the materials were presented including their manner of distribution, circumstances of production, sale or advertising?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 1:

> Congress shall make no law...abridging

the freedom of speech, or of the press...."

18 U.S.C. §1461:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and
>
> "Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and
>
> "Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and
>
> "Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the preventing or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and
>
> "Every paper, writing, advertisement, or representation that any article,

instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

"Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing--

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten

years, or both, for each such offense thereafter...."

STATEMENT OF THE CASE

On November 6, 1972, petitioner William Pinkus was indicted in the United States District Court for the Central District of California on eleven counts of mailing obscene material and advertisements in violation of 18 U.S.C. §1461.[1]

A jury trial held in July of 1973 resulted in petitioner's conviction which was reversed by the Court of Appeals for the Ninth Circuit on or about February 5, 1975.[2] The reversal of the prior conviction under this indictment was based

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1. T. 1-11. The record in the Court of Appeals below consisted of transcripts of the clerk's record and the reporter's record. References to the transcript of the clerk's record are herein designated by the prefix "T", and references to the reporter's transcript are designated by the prefix "R". Counts I, IV, V, VI, VII, IX, X and XI charged petitioner with mailing obscene brochures advertising films, books and magazines (and, in case of Count X, playing cards). Counts II, III and VIII charged him with mailing information where obscene material could be obtained. In addition, Count VII alleged the mailing of an obscene magazine and Count XI alleged the mailing of an obscene film. The dates of the alleged offenses ranged from July 28, 1971, to June 19, 1972.

2. United States v. Pinkus, 73-2900 (9th Cir. 1975).

upon the fact that the jury had been instructed under the expanded concept of obscenity announced in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973), although the alleged offenses occurred prior to that decision so that the more stringent Roth-Memoirs definition of obscenity was applicable. Cf. Marks v. United States, ____ U.S. ____, 97 S.Ct. 990 (1977).

Petitioner was retried before the same trial judge, generally under Roth-Memoirs precepts, in January of 1976; and a jury verdict of guilty on all eleven counts was rendered on January 12, 1976. On February 9, 1976, the Court sentenced William Pinkus to imprisonment for four years on each count, sentences to run concurrently [T. 356]. The Court also initially fined him an aggregate total of $11,000 (Ibid.), but upon noting that this fine was greater than that imposed following the first trial, the Court reduced the fine to $5,500 by entry dated March 1, 1976 (Ibid.).

Appellant filed his notice of appeal to the Court of Appeals for the Ninth Circuit on February 10, 1976.

The disposition of this case in the Court of Appeals is described in the Statement of Jurisdiction at p. 2, supra.

FACTS

The Government Case-in-Chief

The government's case-in-chief consisted solely of the introduction of

the allegedly obscene brochures and advertised or mailed obscene materials [Government Exhs. 1-11, R. 134-141], and the reading of a stipulation that the materials were voluntarily and intentionally mailed by the defendant with knowledge of the content and with the intention that the mailed materials be for the personal use of the recipient (Ibid.). 551 F.2d at 1157.

At close of the government's case, the government acknowledged that certain materials were presented as appealing to deviant groups [R. 147]. The defense called the attention of the Court to the lack of any independent evidence as to the deviant character of the materials (Ibid.), and moved for acquittal [R. 155-156, T. 177-180]. The motion was overruled [R. 164].

The Defense Case

The defense case consisted of expert and survey evidence tending to prove that the materials did not appeal to prurient interest, did not exceed community standards and had redeeming value. A survey of sexual attitudes was, in part, admitted [R. 218-258; 304-432; 469-513; Deft. Exhs. G, H & I]. 551 F.2d at 1157.

In support of the community acceptance of comparable materials, the defense called Whitney Williams, a representative of the entertainment newspaper, Daily Variety, who presented box office statistics for the popular films "Deep Throat" and "The Devil and Miss Jones" in the Los Angeles area [R. 285], indicating that at five dollars per admission, "Deep Throat"

grossed $2,672,476 during 1973 [R. 294, Deft. Exh. D] and additional large sums in 1974 [R. 295]; that "The Devil and Miss Jones" grossed $1,209,180 during 37 weeks in 1973-74 [R. 297, Deft. Exh. E]; and that these sexually explicit films were rated first and third on the list of the ten highest grossing films of the year in Los Angeles [R. 296-297]. At the $5.00 admission price, more than one-half million people attended exhibitions of "Deep Throat" in Los Angeles during 1973 alone, while more than 240,000 people purchased tickets for "the Devil and Miss Jones."

Although the trial judge had permitted the jury to hear the foregoing statistics concerning the public acceptance of "Deep Throat" and "The Devil and Miss Jones," he refused to allow the jury to see these motion pictures. Repeatedly during the trial the defense offered to exhibit these two films to the jury either in a theater [R. 170-172] or in the court room [R. 537-538], both for the benefit of the court and the jury on the issue of obscenity vel non and as comparison materials on the issue of contemporary community standards [R. 691].[3] The trial judge refused to permit these films to be admitted [T. 693] because he had viewed "part" of "Deep Throat" and felt "that it would not be proper for the films that have been offered to be shown to the jury." (Ibid.) There is no explication of why he came to this conclusion. See 551 F.2d at 1160-61.

The trial judge acknowledged that:

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3. Defense Exhibits K, L, M, N and O.

> "... in no way does [this case] involve any distribution of material of any kind to children, and that the evidence will, that there will be a stipulation even that there has been no exposure of any of this evidence to children." [R. 60].

Nevertheless, he permitted cross-examination of a defense witness on the effects of obscenity on children [R. 396-398].

Government Rebuttal

After the defense rested, over objection the government called a rebuttal witness, Dr. James Rue. Dr. Rue was a family counselor with minimal qualifications in sexual matters, whose doctorate was in telecommunications [R. 557-558; 569-570]. Over objection, Dr. Rue mentioned contact with "deviant sexual groupings" in his practice [R. 552] and was allowed to testify that certain aspects of the materials had appeal to "the average person in the community as well as sexually deviant groups." [R. 582-583].

This witness never did testify as to the effect of specific material on particular well-defined deviant groups, and there is utterly no record that the material was designed for or distributed to the members of any deviant group. Dr. Rue's testimony on the subject of deviance was merely that the diverse materials as a whole appealed to the prurient interest of the average person [R. 588] and, also, the prurient interest of a member of an unspecified sexually deviant group [R. 588-589].

Over objection the Court also permitted Dr. Rue to testify as to the adverse effect of obscene materials on the "young person" [R. 578].

In direct examination, Dr. Rue was asked whether he had any experience which would illustrate the effects of viewing similar material on the viewer. He replied that in a case "he was currently dealing with the father had molested his own daughter after having come from an adult book store...." [R. 579]. Petitioner immediately moved to strike and moved for a mistrial, but the motions were denied [R. 579].

The Jury Charge

Notwithstanding the stipulation that children were not involved in this case, the trial court refused to instruct the jury that the defendant was not charged "with having violated any law with regard to minor children" or that the jury should not "assume from the fact that there might have been testimony concerning minor children that the defendant is associated in any way with the issue concerning children." [T. 191, R. 662]. The judge refused all instructions tendered by petitioner which would have defined community standards in terms of what is accepted by the "average adult person" [T. 215; R. 678; R. 670-671].

Instead of excluding consideration of the special sensibilities of minors, the trial judge expressly adopted an instruction requested by the government [R. 243] and charged the jury that:

> "In determining community standards, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men, women and children, from all walks of life." [R. 808]. (Emphasis added).

The district court also charged the jury that in determining the hypothetical average standard in the community, the jury must include the "sensitive," as well as the "insensitive"; that "in other words, you must include everyone in the community." [R. 807].

Despite the lack of sufficient testimony concerning the existence of any well-defined deviant group or groups for whom the material was designed or to whom it was distributed, the Court instructed the jury (over objection), that it must gauge whether the material when "considered in relation to the intended and probable recipients constituted an appeal to the prurient interest of the average person... or the prurient interest of members of a deviant sexual group" [R. 806] and that in applying the prurient interest test it must consider "how the picture would have impressed the average person, or a member of a deviant sexual group...." [R. 806-807].

The Court also instructed the jury at length, over objection, on pandering [R. 810-811]. The charge, in part, instructed the jury that in determining the obscenity of the materials, it could "consider the setting in which they are presented." [R. 810].

> "Examples of what you may consider in this regard are such things as: manner of distribution, circumstances of production, sale and advertising." (Ibid.).

Except for the brochures themselves, there was not a scintilla of evidence on any of these subjects.

The Decision of the Court of Appeals

The Court of Appeals found that the jury instruction on "sensitive persons" was "merely an elaboration on the concept of the total community." 551 F.2d at 1157-58.

While the Court acknowledged its preference that "children be excluded from the Court's instruction until the Supreme Court clearly indicates that inclusion is proper", it refused to reverse the conviction because of the inclusion of children in the instruction. Id. at 1158.

The Court below rejected petitioner's argument concerning the necessity of a foundation for an instruction on deviant appeal, holding that Mishkin v. New York, 383 U.S. 502 (1966) did not require a showing that the material was designed for and disseminated to a clearly defined deviant group. Id. at 1158-59.

Concerning the pandering charge the Court ruled, inter alia, that the mere fact that the occupations of the recipients were mentioned in the stipulation was a sufficient evidentiary foundation to support a charge that the jury could

consider the setting in which the materials are presented, including "manner of distribution, circumstances of production, sale and advertising", even though the record did not deal with these subjects at all. Id. at 1159-60.

The Court of Appeals dismissed as inconsequential improprieties concerning the inclusion of children into the case. Id. at 1160, 1161. Although the Court agreed with petitioner that the admission of the inflammatory testimony of the government rebuttal witness concerning a father molesting his daughter was "error" and that the motion to strike should have been granted, the Court held that reversal was not required and that the Court's denial of petitioner's motion for mistrial was proper. Id. at 1161-62.

The Court of Appeals also held that the comparable motion pictures offered by petitioner were reasonably similar to the film which was the subject of Count 9 of the indictment, but refused to complete its review of the assigned error concerning refusal to admit this evidence in reliance upon the concurrent sentence doctrine. Id. at 1161. The concurrent sentence doctrine had not been asserted by the government and was not briefed below, until petitioner applied unsuccessfully for rehearing in the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

Important questions concerning the definition of the community standard and

the average person in obscenity prosecutions are presented.

A. Children should not be included in the definition of the community.

At least two federal appellate courts have now upheld obscenity convictions based upon jury charges which have instructed the jury that in determining community standards, the community as a whole must be considered, including children. See the decision below, 551 F.2d at 1158; United States v. Manarite, 448 F.2d 583, 592 (2d Cir. 1971), cert. denied, 404 U.S. 947 (1971).

This type of jury charge appeared in the trial which culminated in Roth v. United States, 354 U.S. 493 (1957). However, the notion that this Court's affirmance of the obscenity conviction in Roth was an approval of that instruction was explicitly rejected in Ginzburg v. United States, 383 U.S. 463 (1966), as follows:

> "We are not, however, to be understood as approving all aspects of the trial judge's exegesis of Roth, for example his remarks that 'the community as a whole is the proper consideration. In this community, our society, we have children of all ages, psychotics, feeble-minded and other susceptible elements. Just as they cannot set the pace for the average adult reader's taste, they cannot be overlooked as part of the community.' 224 F.Supp. at 137. Compare Butler v. State of Michigan, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412."

Indeed, the concurring opinion of Judge Frank in the Court of Appeals for the Second Circuit, in Roth, had noted that the correct test is the effect of the material on "average normal adult persons...." United States v. Roth, 237 F.2d 796 (2d Cir. 1956 Frank, j. concurring), aff'd 354 U.S. 476 (1957). It seems clear that this Court's review of Roth was intended to fix the constitutional definition of obscenity, and not to affirm the jury charge.

In Butler v. Michigan, 352 U.S. 380 (1957), this Court considered the validity of a statute which punished distribution to the general public of material having a "potentially deleterious influence upon youth." Id., at 383. Striking down this statute, this Court held that:

> "We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society." Id., at 383-84. (Emphasis added).

To be sure, the charge in the instant case, like the charges in Roth and Manarite, supra, did not define obscenity solely in terms of what is fit for children, but included children as members of the community along with adults. Nevertheless,

the charge clearly has the effect, condemned in Butler, of reducing the level of the community standard below that of the average adult. If the standards applicable to children are to be given any weight in assessing materials distributed to adults, the composite average which results from the calculation will necessarily be below that of the average adult.

This charge also suffers from the vice of being unnecessarily confusing. As further discussed in connection with the "sensitive persons" charge at pp. 19-21, infra, it causes the jurors to attempt an impossible calculation of a hypothetical average person by toting up everyone in the community and computing a mean or median.

In Hamling v. United States, 418 U.S. 129, 94 S.Ct. 2887 (1974), the Supreme Court made it clear that the "average person" is a concept to be employed in a manner similar to the "reasonable person." See also United States v. Treatman, 524 F.2d 320 (8th Cir. 1975). It refers to "the average adult". Ibid. Most recently this Court reaffirmed that there is a "close analogy between the function of 'contemporary community standards' in obscenity cases and 'reasonableness' in other cases." Smith v. United States, ____ U.S. ____, 45 L.W. 4495, 4498 (May 23, 1977). Such a common sense approach suggests that the jurors should merely be instructed to apply the standard of an average normal adult in the community without engaging in the illusory task of calculating that average by some sort of mental survey of the entire community, most of whose members have never even made their standards known to the jurors.

The Court below bases its ruling on this point expressly on a "lack of authority against such an outcome." 551 F.2d at 1158. A writ of certiorari should be granted to supply that authority.[4]

B. "Sensitive persons" should not be included in the definition of the community.

In addition to including "children" as members of the relevant community whose standards were to be applied in assessing the materials for obscenity (see discussion at pp. 16-19, supra) the district court charged the jury that:

> "You are to judge these materials by the standard of the hypothetical average person in the community but in determining this average standard, you must include the sensitive and the insensitive, in other words, you must include everyone in the community." [R. 807] (Emphasis added).

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4. The inclusion of children in the definition of the community was compounded by other errors assigned in the Court of Appeals below. The district judge permitted government testimony on the adverse effect of pornography on children, refused to instruct that children were not involved in the case, and refused to strike government testimony concerning incestuous molestation of a child by an adult bookstore customer. See pp. 10-13, supra.

This instruction is hopelessly confusing for some of the reasons discussed in connection with the inclusion of children as members of the community. See pp. 18-19, supra. This instruction turns topsy-turvy the precept of Miller v. California that material "will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person - or indeed a totally insensitive one. See Roth v. United States, supra, 354 U.S. at 489, 77 S.Ct. at 1311." Miller v. California, 413 U.S. 33 (1973). The purport of this language quoted from the Miller opinion is to exclude from the jury's consideration the sensibilities of most and least sensitive persons. However, the thrust of the amplification of "average man" concept contained in the trial judge's charge here is to require the jury to include the sensibilities of "everyone" in the community in its deliberations before calculating the average level of sensitivity. Although jurors may have some common-sense notion of what an "average" attitude in the community might be, they do not know "everyone in the community," and cannot be expected intelligently to apply an equation which requires them to arrive at the median by reference to "everyone." The practical effect of this instruction is to require the jury to consider and include that which Miller and Roth both required them to ignore and exclude - the sensibilities of the most susceptible members of the community. As this Court recently said,

> "a principal concern in requiring that a judgment be made on the basis of 'contemporary community standards' is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." Hamling v. United States, 418 U.S. 87, 107 (1974).

By undermining that concern, the jury charge in this case was prejudicially erroneous.

In Smith v. United States, ____ U.S. ____, 45 L.W. 4495 (May 23, 1977), as well as Splawn v. California, ____ U.S. ____, 45 L.W. 4574 (June 6, 1977), this Court focused on the critical importance of proper jury instructions in obscenity cases. See particularly, Smith v. United States, ____ U.S. ____, 45 L.W. 4495, 4498 (May 24, 1977).

Certiorari should be granted to develope a clear and understandable definition of the community for use in jury instructions in federal obscenity prosecutions.

II.

Important questions concerning the viability of the concurrent sentence doctrine and the admissibility of comparison evidence in obscenity trials are presented by the decision of the Court below to refrain from reviewing the exclusion of such evidence by reason of the concurrent sentences imposed upon the petitioner.

A. The District Court's reliance upon the concurrent sentence doctrine constituted error and demonstrated a conflict among the circuit courts of appeal as to the application of the doctrine.

In Hamling v. United States, 418 U.S. 87, 125 (1974), this Court held that although mere availability of comparable materials on the newsstands does not make such materials admissible in an obscenity trial, "[t]he defendant in an obscenity prosecution, just as a defendant in any other prosecution, is entitled to an opportunity to adduce relevant, competent evidence, bearing on the issues to be tried." Ibid. Accordingly, petitioner laid an elaborate foundation concerning the massive public acceptance of a mere two films offered as comparison evidence. See Statement of Facts, pp. 9-10, supra.

The Court below concluded that the films would be admissible, under its holding in United States v. Jacobs, 433 F.2d 932, 933 (1970), if the defense were to demonstrate "(1) a reasonable resemblance between the proffered comparables and the allegedly obscene materials, and (2) a reasonable degree of community acceptance of the proferred comparables." 551 F.2d at 1160-61. The Court further found reasonable resemblance between the films proffered and the films in one of the counts of the indictment, but declined to complete its review of this issue because it found dissimilarity between the films and the brochures involved in the other counts, on which petitioner had been concurrently sentenced.

> "This circuit has adopted the concurrent sentence doctrine which, as enunciated by the Supreme Court in Benton v. Maryland, 395 U.S. 784, 791 (1969), ...is that a federal appellate court, as a matter of discretion, may decide that it is unnecessary to consider argument advanced by an appellant with regard to his conviction under one or more counts of an indictment, if he was at the same time validly convicted of other offenses under other counts and concurrent sentences were imposed." 551 F.2d at 1161.

This pronouncement utterly misreads and distorts the holding of Benton v. Maryland, 395 U.S. 784 (1969). In Benton this Court not only declined to apply the concurrent sentence doctrine on the facts before it, it also criticized and restricted the doctrine, noting that one "can search through these [the concurrent sentence] cases, and related ones, without finding any satisfactory explanation for the concurrent sentence doctrine." Id. at 789. This Court ruled that the doctrine is not jurisdictional (Id. at 790), and that "the existence of concurrent sentences does not remove the elements necessary to create a justiciable case or controversy." Ibid. It was acknowledged, in Benton, that "most criminal convictions do in fact entail adverse collateral legal consequences." Ibid. quoting from Sibron v. New York, 392 U.S. 40 (1968). Examples of adverse consequences mentioned in Benton included enhanced sentencing, use of

convictions for impeachment and the like. 395 U.S. at 790-91. In the Benton case, this Court declined to pass on whether the concurrent sentence doctrine even remains a discretionary principal of appellate review:

> "The concurrent sentence rule may have some continuing validity as a rule of judicial convenience. That is not a subject we must canvass today, however. It is sufficient for present purposes to hold that there is no jurisdictional bar to consideration of challenges to multiple convictions, even though concurrent sentences were imposed." Id. at 791. (Emphasis added).[5]

Following Benton, "[m]ost federal appellate courts that have been confronted with a concurring sentence situation... have refused to dismiss automatically an appeal from less than all counts and have similarly refused automatically to find it 'unnecessary' to review remaining counts after one has been examined and found valid." Note, The Federal Concurrent Sentence Doctrine, 70 Columbia L. Rev. 1099, 1109 (1970) (footnote deleted).

> "Arguably, a court's task is to determine whether significant collateral consequences may attend an unreviewed conviction or whether, if an appellant's claims are valid, an erroneous

5. Subsequent decisions of this Court suggest that the doctrine is discretionary for this Court's review on certiorari. Andresen v. Maryland, ___ U.S. ___, 96 S.Ct. 2737, 2739 n.4 (1975); Barnes v. United States, 412 U.S. 837, 848 n. 16 (1973).

> conviction on an as yet unreviewed count may have prejudiced the jury in its deliberations or may have influenced the judge in sentencing." Id., at 1109-1110.

In view of the Benton decision, some circuit courts of appeals have held that prejudice will be presumed, and all counts will be reviewed, unless a lack of prejudice is clearly shown.

> "Since we cannot say that there is no possibility of undesirable collateral consequences attendant upon these convictions, we choose to consider the validity of all the challenged counts." U.S. v. Tanner, 471 F.2d 128, 140 (7th Cir. 1972), cert. denied 409 U.S. 949 (1972); see also United States v. Febre, 425 F.2d 107, 113 (2d Cir. 1970), cert. denied 400 U.S. 849 (1971); United States v. Belt, 516 F.2d 873, 876 (8th Cir. 1975); cert. denied 423 U.S. 1056 (1976).

The cautious application of the concurrent sentence doctrine exemplified by the Febre and Tanner decisions directly conflicts with the application of that doctrine in the Ninth Circuit. As in the case at bar, the Court of Appeals for the Ninth Circuit has tended to invoke the doctrine routinely and without explanation of the criteria upon which it has relied. See, for example, United States v. Moore, 452 F.2d 576 (9th Cir. 1971); United States v. Hendricks, 456 F.2d 167, 179 (9th Cir. 1972); United States v. Ketola, 455 F.2d 83 (9th Cir. 1975); and United States v. Paduano, 549 F.2d 145 (9th Cir. 1977). An earlier decision of the Ninth Circuit which recognized that the mere possible

impairment of opportunity for pardon or parole justified review notwithstanding concurrent sentences seems to have been abandoned. See Clermont v. United States, 422 F.2d 1215, 1217 (9th Cir. 1970), cert. denied 402 U.S. 997 (1971). On at least one occasion, the Ninth Circuit has elected to review assigned error despite the availability of the concurrent sentence doctrine without explanation. See United States v. Murray, 492 F.2d 178 (9th Cir. 1973).

This Court should grant certiorari in order to answer the question left open in Benton, whether the concurrent sentence doctrine remains viable as a discretionary principal of appellate review, and if so, to describe the criteria upon which it should be applied. In so doing, this Court should end the inconsistency with which the doctrine is currently applied in the Ninth Circuit, and the direct conflict between the Ninth Circuit decisions and those of other jurisdictions.

The concurrent sentence doctrine operates with particular unfairness in the present case. In addition to the usual collateral effects incident to the worsening of a criminal record by an additional conviction, there is special prejudice shown to petitioner. It cannot be presumed that the jury, which found him guilty on all counts, kept clearly in mind the nice distinctions between the materials shown them under each separate count. It may well be that if a view of the offered comparison evidence had persuaded the jury that the film was not obscene, it

would have been less inclined to convict on the other counts as well. See Note, The Federal Concurrent Sentence Doctrine, 70 Columbia L. Rev. 1099, 1111 (1970).

Moreover, since much of the other materials at issue consisted of allegedly obscene advertising, and the film to which this Court found the comparison evidence relevant was one of the only examples before the jury as to the content of the product being advertised, the jury may well have been influenced in its appraisal of the ads by its assessment of the film.

Finally, the trial judge may have been influenced in the length of the concurrent sentences imposed by the fact that the jury found the defendant guilty on all counts. Cf. United States v. Yates, 355 U.S. 66 (1957) (remand for resentencing ordered where conviction on one of a number of counts was affirmed).

Under these circumstances, an application of the concurrent sentence doctrine without explicit consideration of the relevant factors was inappropriate. Accordingly, this case presents a particularly appropriate opportunity for review of the concurrent sentence doctrine on certiorari.

B. The District Court erred in excluding the comparison evidence.

If the Court of Appeals below had completed its review of the comparable films offered by the petitioner, it should have found that the District Court had erred in excluding them. This case presents an important question, left open in Hamling

v. United States, 418 U.S. 87 (1974), concerning the circumstances under which a trial court should admit such evidence.

In Hamling, this Court affirmed the refusal of a trial judge to permit the introduction of offered comparable materials. 418 U.S. at 124-25. However, the rejection of comparison evidence in that case was based on factors absent here. First, a "deluge" of materials was offered (id. at 125), whereas in the present case, only two films were offered.

Secondly, the basis, in Hamling, for the defense assertion that the materials had achieved public accptance was merely that some of them had received second-class mailing privileges, others had been found constitutionally protected in litigation, and some were openly available at newsstands. Ibid. This Court held that none of these factors militated in favor of their admission because neither the availability of the materials, nor mailing privileges, create any presumption that the comparable evidence was itself non-obscene (id. at 125-26); and that prior adjudications of nonobscenity do not make the material relevant as to the obscenity of other material. Id. at 126-27. To the contrary, in the present case, the public acceptance of the films was proven by their massive box office performance. See pp. 9-10, supra. And their relevance as to at least certain material in the trial was affirmatively found by the Court of Appeals below. See 551 F.2d at 1161. Accordingly, this case presents the questions whether the principles delineated in the state courts and the lower federal

appellate courts concerning the admission of such evidence are correctly stated, and whether those principles may be arbitrarily disregarded by the district courts.

The necessary foundation for the admission of comparable evidence has been held to consist of two elements: a showing of similarity of the materials and a showing of a "reasonable degree of community acceptance...." Womack v. United States, 294 F.2d 204 (D.C. Cir. 1961), cert. den. 365 U.S. 859, 81 S.Ct. 826 (1961); approved United States v. Womack, 509 F.2d 368, 375-376 (D.C. Cir. 1972), cert. den. 422 U.S. 1022 (1975); followed, United States v. Jacobs, 433 F.2d 932, 933 (9th Cir. 1970). State courts have held that where these elements are present a reasonable amount of non-repetitive materials should be admitted to shed "light on contemporary community standards." Woodruff v. State, 11 Md. App. 202, 220, 273 A.2d 436 (1971); State ex rel. Leis v. Williams S. Barton Co., Inc., 45 Ohio App. 2d 249, 263, 344 N.E.2d 342 (1975); Pierce v. State, 296 S.2d 218, 277 (Ala. 1974), cert. denied 419 U.S. 1130 (1975); see also In re Harris, 16 Cal. Rptr. 889, 366 P.2d 305 (1961).

Review of this case on certiorari is required to establish that the admittedly broad discretion of trial courts to admit or reject evidence is not absolute, and that this Court's decision in Hamling should not be construed as authorizing arbitrary exclusion of offered relevant comparison evidence.

III.

This case presents important questions concerning the prerequisites for a jury charge on prurient appeal to deviant sexual groups.

Petitioner urged as error in the Court of Appeals below, the instruction to the jury that it must gauge whether the material when "considered in relation to the intended and probable recipients constituted an appeal to the prurient interest of the average person...or the prurient interest of members of a deviant sexual group" [R. 806], and that in applying the prurient interest test the jury must consider "how the picture would have impressed the average person, or a member of a deviant sexual group...." [R. 806-807]. See 551 F.2d 1158. Petitioner argued that (i) there was insufficient evidence of prurient appeal to members of sexually deviant groups to sustain any jury charge on the subject; and (ii) that the charge as given was erroneous in that it failed to require the jurors to consider whether the material was "designed for and primarily disseminated to a clearly defined sexual group." Petitioner relied, for these propositions, on the opinion of this Court in Mishkin v. New York, 383 U.S. 501 (1966), which stated, in part:

> "Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant

> theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. The reference to the 'average' or 'normal' person in Roth, 354 U.S. at 489-490, 77 S.Ct., at 1311, does not foreclose this holding. In regard to the prurient-appeal requirement, the concept of the 'average' or 'normal' person was employed in Roth to serve the essentially negative purpose of expressing our rejection of that aspect of the Hicklin test, Regina v. Hicklin (1868) L.R. 3 Q.B. 360, that made the impact on the most susceptible person determinative. We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group; and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons, it also avoids the inadequacy of the most-susceptible-person facet of the Hicklin test." 383 U.S. at 508-509, 86 S.Ct. at 963-964 (Emphasis added).

In dismissing petitioner's contentions on this subject, the Court of Appeals conceded that "[s]ome support for petitioner's position may be found in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 n. 6 (1973). 551 F.2d at 1158-59 n.7. However,

the Court below held that (i) the Mishkin opinion did not establish design of or dissemination to a deviant group as a prerequisite to a deviant appeal charge, (ii) sufficiently specific definition of the deviant groups involved was supplied by the government's rebuttal witness, and (iii) the deviant appeal instruction was supported by Hamling v. United States, 418 U.S. 129 (1974). Id. at 1158-59. These conclusions were each erroneous.

The government's rebuttal testimony hardly constitutes a specific definition of deviant groups. The rebuttal witness did not define or describe the groups but, in the words of the Court below, merely said that the materials appealed to "the prurient interest of homosexuals, sado-masochists and those interested in group sex." Id. at 1158-59 n. 7. Interestingly, this witness testified that the same material had prurient appeal to both average and deviant persons [R. 588-89]. However, irrespective of the sufficiency of that testimony to supply evidence of clearly defined groups, there was no evidence that the material was designed for or disseminated to any such groups. Moreover, the jury instructions omitted any reference to either the requirement that the deviant groups be clearly defined or that the materials be designed for or disseminated to such groups.

In Hamling v. United States, 418 U.S. 87 (1974), this Court did not purport to retreat from its exposition of the principles governing bizarre materials in Mishkin v. New York, 383 U.S. 501 (1966). The issue considered in Hamling was whether

the jurors could consider whether some portions of a work appealed to "a prurient interest of a specifically defined deviant group as well as whether they appealed to the prurient interest of the average person." 418 U.S. at 128. In Hamling, as in Mishkin, there was ample evidence of circumstances of production and massive distribution from which some inference could be drawn as to the design and dissemination of deviant materials to an "intended and probable recipient group." Mishkin v. New York, 383 U.S. 502 (1966), quoted in Hamling v. United States, 418 U.S. at 129. The Hamling opinion fully restated the language in Mishkin referring to material "designed for and primarily disseminated to a clearly defined deviant group." Id. at 129. In the instant case, not only was evidence on this subject totally lacking, but the jury was not even instructed to consider the design and pattern of dissemination of the materials.

By construing the language in Mishkin, quoted in Hamling, as mere surplusage and truncating the prerequisites for submitting the issue of deviant sexual appeal to the jury, the Court below has departed from the standards set down by this Court in a manner which calls for review upon certiorari.

IV.

This case presents important questions concerning the submission of pandering charges to a jury.

Two issues are presented by the pandering instruction given to the jury in the district

court and affirmed by the decision below. First, the record contained insufficient evidence of pandering to support any charge on this subject whatever. Secondly, even if some pandering charge was justified by the record, the instruction as given included specific reference to contextual matters upon which there was no evidence whatever.

A. There was insufficient evidence to support any charge of pandering.

The trial in this case was based upon the materials themselves and a stipulation that they were intentionally mailed by the defendant for the personal use of the several designated recipients. See 551 F.2d at 1157. The lack of any evidence concerning the context of the mailings rendered it improper for the district court to instruct the jury on pandering in any manner whatever.

In both Ginzburg v. United States, 383 U.S. 463 (1966), and Mishkin v. New York, 383 U.S. 502 (1966), the cases which announced the principle that pandering can be considered in assessing the obscenity of materials, there was "abundant evidence to show that each of the publications was originated or sold as stock in trade of the sordid business of pandering...." Ginzburg v. United States, 383 U.S. at 467. This evidence included testimony on the defendant's methods of operation, volume of mailings, scope of public solicitation and the like. Ibid., Cf. Mishkin, 383 U.S. at 505-506.

Similarly, in Hamling v. United States, 418 U.S. 87 (1974), which approved a pandering instruction and reaffirmed the principles of Mishkin and Ginzburg (see 418 U.S. at 130), there was extensive evidence of the extent and methods of distribution of the Illustrated Report and brochure and detail concerning the economics of the publication. Id. at 92-96. The brochure itself contained substantial text from which editorial intent could be gleaned. Id. at 93-94. In sharp contrast, the trial below produced no evidence of any kind on these subjects. While certain of the materials were ads or brochures, the government's case falls far short of that which supported the application of the pandering doctrine in Ginzburg, Mishkin and Hamling. Nevertheless, the trial court instructed the jury along the lines of the pandering instruction in Hamling:

> "Having covered the three elements of obscenity, there is one additional matter that you may consider, and that is the matter of pandering. You must make the decision whether the materials are obscene under the test I have given you. In making this determination you are not limited to the materials themselves. In addition, you may consider the setting in which they are presented. Examples of what you may consider in this regard are such things as: manner of distribution, circumstances of production, sale and advertising. The editorial intent is also relevant.

> What you are determining here is whether the materials were produced and sold as stock in trade of the business of pandering. Pandering is the business of purveying textual or graphic matter openly advertised to appeal to erotic interest of the customer." 551 F.2d at 1159.

While the general relevance and appropriateness of this type of instruction was again upheld in Splawn v. California, ____ U.S. ____, 45 L.W. 4574, 4575 (June 6, 1977), that decision did not consider whether such an instruction is appropriate where the record is devoid of any facts concerning the context of publication and distribution. In Splawn this Court noted that its "authority to review jury instructions is a good deal broader" where the prosecution is "under federal obscenity statutes...." Ibid. This case is thus a timely vehicle for the establishment of the principle that pandering instructions cannot be routinely introduced in all obscenity prosecutions irrespective of the paucity of the record.

Earlier decisions of the Ninth Circuit Court of Appeals refused to permit convictions under the pandering doctrine in the absence of substantial evidence on the subject. See United States v. Baranov, 418 F.2d 1051, 1053 (9th Cir. 1969); Grant v. United States, 380 F.2d 748 (9th Cir. 1967). The instant case represents a significant departure from that principle which should be nipped in the bud.

The pandering doctrine as formulated in Ginzburg v. United States was a narrow holding that "in close cases, evidence of pandering may be probative with respect to the nature of the material...." 383 U.S. at 474. As discussed above, the application of the doctrine in Ginzburg and Mishkin was based upon substantial evidence of the context of the distribution from which pandering could be regarded as proven. This Court's decisions in Hamling and Splawn have now reaffirmed its earlier holdings concerning the relevance of evidence of pandering. However, as demonstrated by the decisions below in this case, it is now necessary for this Court to reaffirm that the conditions upon which the Ginzburg and Mishkin holdings were based remain in effect, and that substantial evidence of pandering is a precondition to the injection of pandering as an issue in an obscenity trial.

B. The charge on pandering invited the jury to consider matters not in evidence.

Even if the jury might have been entitled to consider the content of the brochures or advertisements under a pandering charge (which petitioner denies), the charge in this case went far beyond that content. The trial judge instructed the jurors that they could consider the "setting" in which the materials are presented, including "manner of distribution, circumstances of production, sale and advertising." [R. 810]. There was no evidence whatever on manner of distribution, sale or advertising of the materials other than the bald stipulation that they were mailed for the personal use of the recipient. And there

was no evidence whatever concerning circumstances of production. Accordingly, this instruction invited the jury to consider matters not in evidence.

The Court of Appeals below approved the charge on the basis that the items enumerated by the trial judge were only examples, and that because the occupations of the recipients were known to the jurors, they could infer that distribution was not to a particular professional group. 551 F.2d at 1160. However, the occupations of the recipients could supply no inference whatever as to the circumstances of production, sale or advertising, nor any of the sort of detail concerning manner of distribution which has been present in other cases where this Court has approved of pandering charges.

The critical importance of the pandering instruction is unmistakably evident from the fact that the jury specifically asked for a rereading of that instruction after it had retired to deliberate [R. 821]. In fact, this request was the only question submitted by the jury during its deliberations. Thus the objectionable language quoted above was repeated to it a second time, and received additional emphasis.

This Court has held that it is error to give even a correct charge on facts which are not in evidence.

> "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction

> presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjecture, instead of weighing the testimony." United States v. Breitling, 20 How. 252, 254-55, 61 U.S. 252, 254-55 (1858).

The lack of evidence on the specific matters upon which the trial judge invited the jurors to speculate is sufficient cause for reversal.

* * *

The Court below confirmed, but condoned, the existence of numerous improprieties in the trial of this case. It disapproved of an instruction including children in the community for purposes of assessing community standards. 551 F.2d at 1158. It concurred that there was error in overruling the motion to strike inflammatory testimony of a government witness. Id. at 1161-62. It conceded that permitting cross-examination of a defense witness on the effect of pornography on children might have been erroneous, (Id., at 1160), and its threshold review of the exclusion of defense comparison evidence pointed toward error. 551 F.2d at 1161. The affirmance of petitioner's conviction in

the face of these multiple irregularities can best be explained by the Court's conclusion that "[t]he evidence of obscenity was...overwhelming...." (Id. at 1160), and its inference that petitioner had commercially exploited the materials. Id., at 1159-60.

In the context of these multiple procedural and evidentiary abuses, the review of this case on certiorari assumes an importance which transcends each error considered separately. The mass of obscenity litigation pending in the state and federal courts must inevitably foster a dangerous judicial temptation, exemplified by the affirmance in this case, to sustain a conviction irrespective of all attendant irregularities of procedure and evidence whenever the Court perceives that the defendant is a pornographer and the materials are obscene.

In Roth v. United States, 354 U.S. 476 (1957), this Court held that "obscenity is not within the area of constitutionally protected speech or press." Id. at 485. This exception carved from the constitutional immunity generally accorded expression was retained in Miller v. California, 413 U.S. 15, 23 (1973). The notion that pornographic materials are not entitled to even a "modicum" of protection against criminal sanctions has been questioned. See, for example, Smith v. United States, 45 L.W. 4495, 4500 (May 23, 1977, Stevens, J. dissenting). However, it has never been suggested that the process of differentiating protected from unprotected is less entitled to fairness and precision than other determinations under criminal procedure. To the contrary, the majority opinion in

Miller noted the necessity of reliance upon the "rules of evidence, presumption of innocence, and other protective sections..." in "resolving the inevitably sensitive questions of fact and law...." Id. at 26.

A proper regard for the chilling effect of obscenity prosecutions, as well as the fundamental fairness essential to all criminal trials, requires that special care be exercised by the appellate courts to assure that the prosecution of distributors of materials claiming First Amendment protection is conducted with every regard for proper procedure. Such care was utterly lacking in the judicial treatment of petitioner.

Certiorari should be granted for the purpose of emphasizing that even a defendant accused of being a pornographer is entitled to a fair trial.

CONCLUSION

For the foregoing reasons, petitioner respectfully urges this Court to grant the writ of certiorari and accept this case for review.

Respectfully submitted,

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APPENDIX

(filed June 6, 1977)
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 76-1393
Plaintiff-Appellee,	)	
v.	)	
WILLIAM PINKUS, doing business as "Rosslyn News Company" and "Kamera",	)	ORDER
Defendant-Appellant.	)	

Before: WRIGHT and WALLACE, Circuit Judges, and ORRICK, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Wright Wallace have voted to reject the en banc suggestion.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

DATED:

(filed April 7, 1977)
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 76-1393
Plaintiff-Appellee,	)	
v.	)	
WILLIAM PINKUS, doing business as "Rosslyn News Company" and "Kamera",	)	OPINION
Defendant-Appellant.	)	

Appeal from the United States
District Court for the Central
District of California

Before: WRIGHT and WALLACE, Circuit Judges, and ORRICK, District Judge.*

WRIGHT, Circuit Judge:

On this appeal from a conviction on 11 counts of mailing obscene material[1] in violation of 18 U.S.C. §1461 (1970),[2] we are presented with nine claims of error, of which several require extended

*Of the Northern District of California; Honorable William H. Orrick, District Judge, sitting by designation.

consideration. They direct our attention to the adequacy and propriety of the jury instructions and the trial court's refusal to admit in evidence for jury viewing two full length motion pictures which are said to be box office successes, if not smash hits, at least with some audiences. We conclude that the trial was fairly conducted, without reversible error, and the judgment and sentence must be affirmed.

At trial, the government's case-in-chief consisted of the introduction of the obscene materials and the reading of a stipulation that they were voluntarily and intentionally mailed by the appellant with knowledge of the content and with the intention that they be for the personal use of the recipient. It was also stipulated that none had been mailed to children.

The defense introduced expert and survey evidence to prove that the materials did not appeal to prurient interests or exceed community standards, and that they had redeeming social value.[3] In rebuttal, the government called a family counseler who testified, among other things, that the materials had prurient appeal to the average person in the community as well as to sexually deviant groups.

I.

JURY INSTRUCTIONS

Appellant challenges four portions of the jury instructions and contends, as a fifth claim of error, that the court erred in refusing a requested instruction.

We consider first whether there was reversible error in any instruction.

A. Sensitive Persons.

The court instructed the jury:[4]

> Thus the brochures, magazines and film are not to be judged on the basis of your personal opinion. Nor are they to be judged by their effect on a particularly sensitive or insensitive person or group in the community. You are to judge these materials by the standard of the hypothetical average person in the community, but in determining this average standard you must include the sensitive and the insensitive, in other words, you must include everyone in the community.

Appellant contends that, by including the sensitive and the insensitive in determining the standard of the hypothetical average person in the community, the jury would not be adhering to the precept in Miller v. California, 413 U.S. 13, 33 (1973), that the material "be judged by its impact on the average person, rather than a particularly susceptible or sensitive person--or indeed a totally insensitive one," and therefore the instruction was erroneous.

We disagree. The Supreme Court has frequently held that jury instructions are to be judged as a whole, rather than by picking isolated phrases from them. Boyd v. United States, 271 U.S. 104, 107 (1926);

Hamling v. United States, 418 U.S. 87, 107-108 (1974); see also Unites States v. Moore, 522 F.2d 1068, 1079 (9th Cir. 1975), cert. denied, 423 U.S. 1049 (1976). The judge's reference here to the sensitive and the insensitive was merely an elaboration on the concept of the total community.

The trial judge specifically said that the hypothetical average person standard was to be used and that the materials were not to be judged by their effect on a particularly sensitive person. The instructions were not inconsistent with Miller v. California, supra.

B. Children in the Community.

Another challenged portion of the instructions stated:[5]

> In determining community standards, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men and women and children, from all walks of life.

Appellant objects to the word children in the court's definition of community. Although we note that the Second Circuit has upheld a virtually identical instruction in United States v. Manarite, 448 F.2d 583, 592 (2d Cir.), cert. denied, 404 US.. 947 (1971), we find no reversible error here, not because of the outcome in Manarite, but because of the lack of authority against such an outcome. We do not imply that we approve this language. Rather, we feel that the specific inclusion

of children is unnecessary in the definition of the community and prefer that children be excluded from the court's instruction until the Supreme Court clearly indicates that inclusion is proper.

At present, the Supreme Court has both upheld a conviction involving the inclusion of children in the community [see Roth v. United States, 354 U.S. 476, 490 (1957)] and intimated that it does not necessarily approve such a charge. See Ginzburg v. United States, 383 U.S. 463, 465 n.3 (1966). Although the Court has emphasized that the jury is to ascertain the sense of the "average person, applying contemporary community standards" when deciding the obscenity question [see Hamling v. United States, 418 U.S. 87, 105 (1974)], it has not defined the term community in other than a geographical sense.

The instruction in this case did not, as appellant contends, result in reducing the adult population of the Central Judicial District of California to reading what is fit only for children. Compare Butler v. Michigan, 352 U.S. 380 (1957). The entire community was explicitly made the appropriate standard for consideration. The error, if any, does not require reversal.

C. Deviant Sexual Groups.

Relying on Mishkin v. New York, 383 U.S. 502 (1966), appellant next challenges that portion of the instruction which reads:[6/]

> In applying this test, the question involved is not how the picture now impresses the individual juror, but rather, considering the intended and probable recipients, how the picture would have impressed the average person, or a member of a deviant sexual group at the time they received the picture.

He interprets Mishkin to hold that a deviant-appeal instruction cannot be given unless there is sufficient evidence to establish that the material was designed and disseminated to a deviant group, as well as evidence which clearly defines that group and shows that it was involved in some way this these materials. Although Mishkin stated that Roth did not foreclose a finding of obscenity when the foregoing was proved, it did not hold that such evidence was a prerequisite to such a charge.

The only requirement imposed along the lines appellant suggests was that "the recipient group be defined with more specificity that in terms of sexually immature persons." Id. at 509. This requirement was met by the testimony of the government rebuttal witness.[7/]

Our case is similar to Hamling v. United States, supra, where the district court instructed as to the prurient interest of deviant groups even though there was no evidence as to specific deviant appeal. The court of appeals found no error, stating that it was

"'manifest that the District Court considered that some of the portrayals in the Brochure might be found to have a prurient appeal' to a deviant group." Id. at 128. The Supreme Court affirmed. That reasoning is applicable here. See also, United States v. Hill, 500 F.2d 733 (5th Cir. 1974), cert. denied, 420 U.S. 952 (1975).

D. Pandering.

The trial judge also instructed the jury on pandering, stating:[8]

> Having covered the three elements of obscenity, there is one additional matter that you may consider, and that is the matter of pandering. You must make the decision whether the materials are obscene under the test I have given you. In making this determination you are not limited to the materials themselves. In addition, you may consider the setting in which they are presented. Examples of what you may consider in this regard are such things as: manner of distribution, circumstances of production, sale and advertising. The editorial intent is also relevant. What you are determining here is whether the materials were produced and sold as stock in trade of the business of pandering. Pandering is the business of purveying textual or graphic matter openly advertised to appeal to erotic interest of the customer.

Appellant contends that there was insufficient evidence to support a charge of pandering and that in any event the charge invited the jury to consider matters not in evidence, such as manner of distribution and circumstances of production (the stipulation stating only that the materials had been intended and mailed for personal use).

Appellant relies on United States v. Baranov, 418 F.2d 1051 (9th Cir. 1969), for the proposition that mere proof of mailing does not support a pandering charge. See also Redrup v. New York, 386 U.S. 767 (1967).

United States v. Pellegrino, 467 F.2d 41 (9th Cir. 1972), provides a good framework for analyzing whether there is evidence of pandering in a case where the charged materials, not stipulated to be nonobscene as in Baranov, are available for examination. In Pellegrino we noted that the question of pandering is not wholly irrelevant in the case of advertising; that mass mailings can be consistent with a nonobscene publication as well as with an obscene one; and that the text of the material is not to be ignored in determining whether there is "commercial exploitation of erotica solely for the sake of their prurient appeal. 383 U.S. at 466." Pellegrino, 467 F.2d at 45-46.

In Pellegrino, the brochure contained chaste and self-serving disclaimers of obscene theme which were not transparently spurious. The persistent theme of the brochure was that the book it advertised was worth buying because it imparted

knowledge and understanding of materials of importance to all adults. Id. at 46. Our review of the exhibits in this case makes it clear that we have here quite a different situation. In fact, many elements of pandering identified in Ginzburg v. United States, 383 U.S. 463 (1966), are present.

In identifying pandering, the Court in Ginzburg noted that the "leer of the sensualist" permeated the advertising, the solicitation was indiscriminate and not limited to those who might independently discern the material's therapeutic worth, the petitioner deliberately represented his materials as erotically arousing, and such representations tended to force public confrontation with potentially offensive aspects of the work. 383 U.S. at 486-70.

In this case, although the mailing location was not chosen for its impact value as in Ginzburg, all other elements noted above that the Court found determinative of pandering were present. We find, therefore, that there was sufficient information in the stipulation and the materials themselves to support a pandering charge.

As to the charge itself, we find no error in the mention of manner of distribution and methods of production as examples of what the jurors could consider in addition to the materials themselves. Although the stipulation did not detail appellant's method of operation in terms of how the recipients were chosen and what the precise method of production was, it did contain information such as the

occupation of the recipients, from which the jury could infer that no particular professional group was singled out for distribution. The charge did not instruct the jury to consider matters not in evidence.

As a fifth allegation of error, appellant contends that it was error for the court to refuse to instruct the jury that minor children were not involved in the case. We find no error. It was clear from the stipulation that children were not involved and that none had been recipients of the mailed materials. Additionally, the jurors were told during voir dire that no children were involved. We do not find other alleged improprieties concerning the intrusion of children into the case sufficient to make the ruling erroneous.

II.

EVIDENTIARY RULINGS

A. Cross-examination.

Appellant contends that the court erred in allowing cross-examination of a defense witness on the possible deleterious influence of the materials on young children.

As the Court recently stated in United States v. Hamling, 418 U.S. at 124-25:

> Petitioners have very much the laboring oar in showing that such rulings constitute reversible error, since "in judicial

> trials, the whole tendency is to leave rulings as to the illuminating relevance of testimony largely to the discretion of the trial court that hears the evidence." NLRB v. Donnelly Co., 330 U.S. 219, 236 (1947). . . .

We conclude that any error was harmless. The total testimony as to the effect of the materials on young children was only three or four pages in a transcript of more than 600 pages. The evidence of obscenity was so overwhelming that this bit of testimony provides no basis for reversible error.

B. Comparable Materials.

The appellant also challenges the judge's ruling that the jury would not be allowed to view the allegedly comparable films of "Deep Throat" and "The Devil in Miss Jones."

Preliminarily we note that the trial judge did not indicate specifically his ground for refusing admission of the evidence. Initially he ruled that no proper basis had been established[9] and later he stated that the movies were not "proper" for the jury to see.[10]

Although this makes review more difficult, it is well-settled that "if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." Helvering v. Gowran, 302 U.S. 238, 245 (1937). We shall consider the applicable law to determine if there is

any ground upon which the evidence could properly have been refused.

"The defendant in an obscenity prosecution, just as a defendant in any other prosecution, is entitled to an opportunity to adduce relevant, competent evidence bearing on the issues to be tried." Hamling v. United States, 418 U.S. at 125. In this circuit, however, for the films to be admissible as comparable and probative of community standards the burden is on the defendant to demonstrate two prerequisites: (1) a reasonable resemblance between the proffered comparables and the allegedly obscene materials, and (2) a reasonable degree of community acceptance of the proffered comparables. United States v. Jacobs, 433 F.2d 932, 933 (9th Cir. 1970).

We have viewed the two allegedly comparable films as well as all the other exhibits in this case. We conclude that "Deep Throat" and "The Devil in Miss Jones" bore a reasonable resemblance to the film "No. 613" identified in count 9 of the indictment, but not to the other materials identified in the other 10 counts.

The three films were similar because they presented the same or similar sexual acts with an equal degree of explicitness. Thus the first prong of the Jacobs test was met as to them. The brochures and magazine, however, were of a different medium, and as one court has noted "slight variations in format" may produce "vastly different consequences in obscenity determinations." United States v. Womack, 509 F.2d 368, 378 (D.C. Cir. 1974), cert.

denied, 422 U.S. 1022 (1975). Moreover, the brochures advertised materials pertaining to homosexuality and sadobondage. These subjects were not portrayed in the two proffered films. As to the brochures and the rest of the exhibits, exclusive of film "No. 613", we find that the first prong of Jacobs was not met and the trial judge committed no error in exercising his discretion to deny the offer of the two films into evidence.

This circuit has adopted the concurrent sentence doctrine which, as enunciated by the Supreme Court in Benton v. Maryland, 395 U.S. 784, 791 (1969), is that a federal appellate court, as a matter of discretion, may decide that it is unnecessary to consider arguments advanced by an appellant with regard to his conviction under one or more counts of an indictment, if he was at the same time validly convicted of other offenses under other counts and concurrent sentences were imposed. United States v. Moore, 452 F.2d 576, 577 (9th Cir. 1971); United States v. Paduano, ___ F.2d _____ (9th Cir. Jan. 25, 1977) (slip op. at 6); United States v. Ratcliffe, ___F.2d _____ (9th Cir. Dec. 16, 1976) (slip op. at 3).

Pinkus was sentenced to four years on each of the eleven counts, the sentences to run concurrently. We therefore decline to examine the question whether he demonstrated sufficient community acceptance of the comparable films to warrant our finding that the trial judge erred in excluding the evidence with respect to count 9.

III.

DEFENSE MOTIONS

A. Motion for Acquittal.

Appellant contends that the court erred in denying his motion for acquittal at the end of the government's case. The basis for the motion was that the government failed to introduce expert testimony to support a claim of deviant appeal. As discussed in Part I, supra, appellant's cases do not support his contention. Mishkin and Hamling allow us to conclude that the materials speak for themselves on this matter.

B. Motions to Strike and for Mistrial.

Appellant also moved to strike and for a mistrial in response to the following testimony of the government rebuttal witness: "In the case that I'm currently dealing with the father molested his own daughter after having come from an adult book store."[11] Both motions were denied.

Because no foundation had been laid to connect the materials viewed by the father with those at issue in this case, we agree with the appellant that this was a situation "where the minute peg of relevance [was] entirely obscured by the dirty linen hung upon it." Lucero v. Donovan, 354 F.2d 16, 22 n.7 (9th Cir. 1966). The error in denying the motion to strike, however, is not so severe, when viewing the entire case, as to require reversal. Denying the motion for mistrial was proper.

The decision of the district court is AFFIRMED.

F O O T N O T E S

1/ The indictment recited that Pinkus had mailed obscene illustrated brochures advertising sex films, books, magazines and playing cards; the magazine "Bedplay"; and an 8 mm. film, "No. 613," to addressees in Nevada, New York, Iowa, Pennsylvania, Texas and New Jersey.

2/ Title 18 U.S.C. § 1461 provides in pertinent part:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and --
>
> "Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made. . . .
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section 3001(e) of Title 39 to be non-mailable, or knowingly causes

to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter. . . ."

3/ In the conviction appealed from, the Roth-Memoirs standard for determining obscenity was used. See Roth v. United States, 354 U.S. 476 (1957) and Memoirs v. Massachusetts, 383 U.S. 413 (1966). The Memoirs Court restated the Roth test in the following manner:

> "as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

383 U.S. at 418.

4/ Reporter's Transcript at 807.

5/ Reporter's Transcript at 808.

6/ Reporter's Transcript at 806-07.

7/ The witness testified that there was appeal in the materials to the prurient interests of homosexuals, sado-masochists and those interested in group sex.

Some support for appellant's position may be found in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 n.6 (1973), where the Court, in discussing that obscene materials speak for themselves and no expert affirmative evidence is necessary when the materials are actually placed in evidence, qualified its duscussion by noting: "We reserve judgment, however, on the extreme case, not presented here, [group sex, fellatio, and cunnilingus were present in that case] where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest." But see discussion of Hamling in text, infra.

8/ Reporter's Transcript at 810.

9/ Reporter's Transcript at 171.

10/ Reporter's Transcript at 693.

11/ Reporter's Transcript at 579.

APPENDIX

Supreme Court of the United States

October Term, 1977

No. 77-39

WILLIAM PINKUS, doing business as "ROSSLYN NEWS COMPANY" and "KAMERA",
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petition for a Writ of Certiorari Filed July 6, 1977

Certiorari Granted October 31, 1977

TABLE OF CONTENTS

No. 11444

United States District Court

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM PINKUS, dba "Rosslyn News Company" and "Kamera",
Defendant.

RELEVANT DOCKET ENTRIES

a. 11/6/72 Indictment filed.

b. 12/4/72 Defendant pleads not guilty.

c. 7/18/73 * * * VERDICT, jury finds defendant guilty as charged in Counts 1 thru 11 inclusive.

d. 4/1/75 Received from Court of Appeals certified copy of Judgment of Court of Appeals reversing and remanding to United States District Court for further proceedings * * *.

e. 1/8/76 Filed defendant's proposed jury instructions submitted on behalf of defendant. Filed United States' proposed jury instructions.

f. 1/12/76 MINUTE ORDER: 5th day Retrial By Jury: defendant offer of proof re further evidence denied. Defendant's Motion for mistrial denied. Defendant's Motion for surrebuttal of witness denied. Jury returns verdict of GUILTY on Counts 1 thru 11 of indictment. Referred to P/O for I & R and continued 2/9/76, 9:00 A.M. for sentencing and hearing any of defendant's motions filed and notice for hearing said date. Filed verdicts, notes from jury, exhibits, witnesses and exhibits lists and jury instruction.

g. 2/9/76 Hearing, sentence: defendant's Motion for New Trial, etc. after verdict of GUILTY to Counts 1 thru 11 of the indictment. Defendant's counsel submits motions on pleadings. Court orders motions denied. ENT. 2/12/76. Court orders defendant committed to custody of Attorney General for imprisonment for a period of four years and $1,000.00 fine as to Count 1 of indictment. Counts 2 thru 11, Court orders defendant to four years imprisonment on each Count and imposes a fine of $1,000.00 as to each Count. Sentence on Counts 2 thru 11 to run concurrently with each other and concurrently with sentence imposed in Count 1 of the indictment. Sentence is imposed under the provisions of Title 18 U.S.C. 4208(a)(1). Total fine is $11,000.00. Defendant's Motion for Court to bail pending appeal. Court orders Notice of Appeal to be filed. Notice of Appeal is filed and Court hears Attorney Atkins on Motion. Court orders bond pending Appeal set in the amount of $1,500.00 Corporate Surety. Bond exonerated and defendant notified of his right to appeal. Filed Judgment and issued copies. Entered 2/12/76.

h. 2/10/76 Filed Notice of Appeal as to defendant William Pinkus from judgment entered 2/9/76.

i. 3/1/76 MINUTE ORDER: Correction of sentence as to defendant William Pinkus. Court orders earlier sentence vacated. Count 1: four years imprisonment, pay fine of $500.00. Counts 2 thru 11: four years imprisonment, pay $500.00 fine each count concurrently and concurrently with sentence of imprisonment in Count 1 as to imprisonment only. Total fine is $5,500.00. Sentence pursuant to 18:4208(a)(1). Defendant's Notice of Appeal already filed. Same bond on appeal to apply. Bond on appeal set in amount of $1,500.00 C/S. Earlier bond executed. Entered 3/15/76. MADE SUPPL. JS-3.

RELEVANT CHARGES AND SENTENCING

No. 11444 CD

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
September 1972 Grand Jury

UNITED STATES OF AMERICA,
Plaintiff,

v.

WILLIAM PINKUS, dba "Rosslyn News Company" and "Kamera",
Defendant.

INDICTMENT

[18 U.S.C. §1461: Mailing Obscene Material and Advertisements]

(Filed November 6, 1972)

The Grand Jury charges:

COUNT ONE

[18 U.S.C. §1461]

On or about July 28, 1971, in Los Angeles County, within the Central District of California, defendant WILLIAM PINKUS, doing business as "Rosslyn News Company" and "Kamera" knowingly used, and caused to be used, the mails for mailing, carriage in the mails, and delivery of a letter according to the directions thereon addressed to Calin R. Coburn at 4141 Eastern, #1, Las Vegas, Nevada 89109 from 1350 North Highland Ave., Room 4, Hollywood, California 90028, containing an obscene illustrated brochure advertising sex films, books and magazines.

COUNT TWO

[18 U.S.C. §1461]

On or about July 28, 1971, in Los Angeles County, within the Central District of California, defendant WILLIAM PINKUS, doing business as "Rosslyn News Company" and "Kamera" knowingly used, and caused to be used, the mails for mailing, carriage in the mails, and delivery of a letter according to the directions thereon addressed to Milton L. Town at 311 Troy Road, Rochester, New York 14618, from 1350 North Highland Avenue, Room 4, Hollywood, California 90028, containing an advertisement giving information where, how, from whom, and by what means an obscene magazine entitled "Bedplay" could be obtained.

COUNT THREE

[18 U.S.C. §1461]

On or about July 28, 1971, in Los Angeles County, within the Central District of California, defendant WILLIAM PINKUS, doing business as "Rosslyn News Company" and "Kamera" knowingly used, and caused to be used, the mails for mailing, carriage in the mails, and delivery of a letter according to the directions thereon addressed to Toni Mandernach, Odebolt, Iowa 51458, from 1350 North Highland Av., Room 4, Hollywood, California 90028, containing an advertisement giving information where, how, from whom, and by what means an obscene magazine entitled "Bedplay" could be obtained.

COUNT FOUR

[18 U.S.C. §1461]

On or about September 9, 1971, in Los Angeles County, within the Central District of California, defendant WIL-

LIAM PINKUS, doing business as "Rosslyn News Company" and "Kamera" knowingly used, and caused to be used, the mails for mailing, carriage in the mails, and delivery of a letter according to the directions thereon addressed to Toni Mandernach, Odebolt, Iowa 51458, from Kamera, 1350 N. Highland Ave., Hollywood, California 90028, containing an obscene illustrated brochure advertising sex films, books and magazines.

COUNT FIVE

[18 U.S.C. §1461]

On or about September 9, 1971, in Los Angeles County, within the Central District of California, defendant WILLIAM PINKUS, doing business as "Rosslyn News Company" and "Kamera", knowingly used, and caused to be used, the mails for mailing, carriage in the mails and delivery of a letter according to the directions thereon addressed to Jay W. Becker, 93-14 215th Street, Queens Village, New York 11428, from 1350 North Highland Ave., Room 4, Hollywood, California 90028, containing an obscene illustrated brochure advertising sex films, books and magazines.

COUNT SIX

[18 U.S.C. §1461]

On or about September 9, 1971, in Los Angeles County, within the Central District of California, defendant WILLIAM PINKUS, doing business as "Rosslyn News Company" and "Kamera", knowingly used, caused to be used, the mails for mailing, carriage in the mails, and delivery of a letter according to the directions thereon addressed to Ben T. Winsor, 1701 Crafton Boulevard, Pittsburgh, Penna. 15205, from Kamera, 1350 N. Highland Ave., Holly-

wood, California 90028, containing an obscene illustrated brochure advertising sex films, books and magazines.

COUNT SEVEN

[18 U.S.C. §1461]

On or about September 17, 1971, in Los Angeles County, within the Central District of California, defendant WILLIAM PINKUS, doing business as "Rosslyn News Company" and "Kamera" knowingly used, and caused to be used, the mails for mailing, carriage in the mails, and delivery of a package according to the directions thereon addressed to Hal Waller, Box 1273, San Marcos, Texas 78666, from Kamera, 1350 N. Highland Ave., Hollywood, California 90028, containing an obscene magazine entitled "Bedplay" and obscene illustrated brochures advertising sex films, books and magazines.

COUNT EIGHT

[18 U.S.C. §1461]

On or about November 9, 1971, in Los Angeles County, within the Central District of California, defendant WILLIAM PINKUS, doing business as "Rosslyn News Company" and "Kamera" knowingly used, and caused to be used, the mails for mailing, carriage in the mails, and delivery of a letter according to the directions thereon addressed to Hal Waller, Box #1273, San Marcos, Texas, 78666, from 1350 North Highland Ave., Room 4, Hollywood, California 90028, containing an advertisement giving information where, how, from whom, and by what means an obscene film described as No. "613" could be obtained.

COUNT NINE

[18 U.S.C. §1461]

On or about November 29, 1971, in Los Angeles County, within the Central District of California, defendant WILLIAM PINKUS, doing business as "Kamera", knowingly used, and caused to be used, the mails for mailing, carriage in the mails, and delivery of a package according to the directions thereon addressed to Hal Waller, Box 1273, San Marcos, Texas 78666, from Kamera, 1350 N. Highland Ave., Hollywood, California 90028, containing a reel of 8mm obscene movie film identified as No. "613" and obscene illustrated brochures advertising sex films, books and magazines.

COUNT TEN

[18 U.S.C. §1461]

On or about March 30, 1972, in Los Angeles County, within the Central District of California, defendant WILLIAM PINKUS, doing business as "Rosslyn News Company" and "Kamera" knowingly used, and caused to be used, the mails for mailing, carriage in the mails, and delivery of a letter according to the directions thereon addressed to Ben T. Winsor, 1701 Crafton Boulevard, Pittsburgh, Penna. 15205, from 1350 North Highland Ave., Room 4, Hollywood, California 90028, containing an obscene illustrated brochure advertising sex films, books, magazines and playing cards.

COUNT ELEVEN

[18 U.S.C. §1461]

On or about June 19, 1972, in Los Angeles County, within the Central District of California, defendant WILLIAM PINKUS, doing business as "Rosslyn News Com-

pany" and "Kamera" knowingly used, and caused to be used, the mails for mailing, carriage in the mails, and delivery of a letter according to the directions thereon addressed to R. Gauthier, 400 North 12th St., Neward, NJ 07107, from 1350 North Highland Ave., Room 4, Hollywood, California 90028, containing obscene illustrated brochures advertising sex films, books, and magazines.

A True Bill

/s/ SHIRLEY A. REUTER
Foreman

/s/ WILLIAM D. KELLER
United States Attorney

SENTENCE

(Dated February 9, 1976)

[Title omitted in printing]

PROCEEDINGS:

HEARING: Deft's motion for new trial, etc.

SENTENCING: after verdicts of guilty to Counts 1 thru 11 of the Indictment.

Defendant's counsel submits motions on pleadings. Court orders motions denied.

Court orders defendant commtd to custody of the Attorney General for imprisonment for a period of four years and a $1,000.00 fine as to Count 1 of Indictment. As to Counts 2 thru 11 the Court orders the defendant commtd to custody of Attorney General for a period of four years as to each count and imposes a fine of $1,000.00 fine as to each count. Sentence as to Counts 2 thru 11 are ordered to run concurrently with each other and concurrently with

the sentence imposed on Count 1 of the Indictment. Sentence is imposed under the provisions of Title 18, USC 4208(a)(1). Total fine is $11,000.00. Defendant's motion for court to set bail pending appeal. Court orders Notice of appeal to be filed. Notice of appeal is filed and Court hears Attorney Atkins on motion. Court orders bond pending appeal set in the amount of $1,500.00 Corporate Surety. Bond exonerated, and defendant notified of his right to appeal. Final judgmnt and issued copies.

CORRECTED JUDGMENT AND COMMITMENT

(Filed March 1, 1976)

[Title omitted in printing]

On this 1st day of March, 1976 came the attorney for the government and the defendant appeared in person and with his attorney, Elliot J. Abelson, retained,

IT IS ADJUDGED that the defendant upon his plea of Not Guilty and verdicts of Guilty to Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the Indictment, has been convicted of the offense of mailing obscene material and advertisements, in violation of Title 18, United States Code, Section 1461, as charged in Counts 1 thru 11 of the Indictment,

IT IS ORDERED, sentence imposed on February 9, 1976 is vacated and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized

representative for imprisonment for a period of Four years and pay a fine to the United States in the amount of $500.00 as to Count 1 of the Indictment, as to Counts 2 thru 11 the defendant is ordered committed to the custody of the Attorney General or his authorized representative for a period of four years as to each count and pay a fine of $500.00 to the United States on each count of Counts 2 thru 11. The imprisonment of the defendant on Counts 2 thru 11 are ordered to run concurrently with each other and concurrently with the sentence imposed on Count 1 of the Indictment. Total fine is in the amount of $5,500.00.

Sentence is imposed under the provisions of Title 18, United States Code Section 4208(a)(1). Defendant's bond is ordered exonerated. Defendant is notified of his right to appeal.

Bond on appeal is set in the amount of $1,500.00 Corporate Surety after notice of appeal is filed.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ DAVID W. WILLIAMS
United States District Judge.

/s/ JOSEPH A. MONTAGUE
Deputy Clerk.

TRANSCRIPT OF TESTIMONY

(Trial Commenced January 6, 1976)

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Title omitted in printing]

• • • • •

EXCERPT OF STATEMENT OF DISTRICT JUDGE
DAVID W. WILLIAMS

• • • • •

[58] We have told you that if there is any reason why in your own mind you feel, even from matters that you haven't **[59]** even been asked about up to now, that makes you say, "I don't think I belong on this jury," or, "I don't think I want to be on this jury."

I want to give you another opportunity now to either raise your hand in answer to that question or to speak to it or tell us something that may be in your mind, that you think may touch importantly upon it, so that the lawyers may again exercise their peremptory challenge.

And I come to you again with this, not for emphasis, but only because when you have undergone all of the interrogation that you have, you might sit there and say to yourself, "I wish that I had the opportunity of giving a different answer to one of those earlier questions," or, "I think maybe now that I have thought about it a little, there is something else I ought to tell the Judge about a question that he asked me, or he hasn't even asked this question, but I know what they are trying to do is pick a fair jury, and I know that what we are being called upon to judge, and in all fairness to the lawyers, I think I ought to tell them something I had an interest

in in the past or something that happened to me, or something I studied or had an especial interest in."

Are there any of you who either want to modify a question you were asked earlier, want to change it altogether or want to speak on any subject that you think touches importantly on your qualifications as a juror in this case? **[60]** If so, just raise your hand.

Mrs. Cohrth?

Prospective Juror No. 10: The question in my mind is: Is this available to children? Is this mailing list available to children?

The Court: Counsel come to the bench.

(The following proceedings were held at the bench:)

The Court: I think the answer to that is unqualifiedly no, is that correct?

Mr. Atkins: That is correct. It is part of the stipulation, your Honor.

Mr. Mayock: Your Honor, the evidence in this case will not reflect the mailing to any minors of the particular exhibits in question.

The Court: Okay.

(The following proceedings were held in open court:)

The Court: I wanted to be sure I was answering this correctly, Mrs. Cohrth, and the answer to it is that in no way does it involve any distribution of material of any kind to children, and that the evidence will, that there will be a stipulation even that there has been no exposure of any of this evidence to children.

Now, I thank you for inquiring into that because it **[61]** shows all of us that you are pondering this question, as we want you to ponder it. Thank you very much for calling that to our attention.

* * * * *

STIPULATION

[133] The Court: Mr. Mayock has explained what a stipulation is. I want to just add this, that in this case, as in most cases involving stipulations, it is an effort on the part of counsel who cooperate for the purpose of shortening the trial, and to prevent the necessity of bringing witnesses **[134]** here who would testify to uncontroverted facts. And so, instead of having to bring a person from a far away state to say that he lives there, and that on such-and-such a date he received a transmission of mail that contained such-and-such a thing inside it, counsel have agreed that those facts did in fact occur, and that will be the subject of this stipulation that is being read.

Mr. Mayock: It is hereby stipulated:

"One, on or about July 28, 1971, in Los Angeles County, within the Central District of California, defendant William Pinkus, doing business as 'Rosslyn News Company' and 'Kamera' voluntarily and intentionally used and caused to be used the mails for mailing, carriage in the mails and delivery, with knowledge of its contents, a letter, which is Government's Exhibit No. 1, according to the directions thereon, addressed to Calin R. Coburn, a college student, at 4141 Eastern, No. 1, Las Vegas, Nevada 89109 from 1350 North Highland Avenue, Room 4, Hollywood, California 90028, containing an illustrated brochure advertising sex films, books and magazines, and it was defendant Pinkus' intention that this letter and its contents be for the personal use of the recipient.

"Second, on or about July 28, 1971, in Los Angeles **[135]** County, within the Central District of California, defendant William Pinkus, doing business as

'Rosslyn News Company' and 'Kamera' voluntarily and intentionally used and caused to be used the mails for mailing, carriage in the mails and delivery with knowledge of its contents of a letter, which is Government's Exhibit No. 2, according to the directions thereon, addressed to Milton L. Town, a retired person at 311 Troy Road, Rochester, New York 14618, from 1350 North Highland Avenue, Room 4, Hollywood, California 90028, containing an advertisement giving information where, how and from whom and by what means a magazine entitled 'Bed Play' could be obtained. And it was defendant Pinkus' intention that this letter and its contents be for the personal use of the recipient.

"Three, on or about July 28, 1971, in Los Angeles County, within the Central District of California, defendant William Pinkus, doing business as 'Rosslyn News Company' and 'Kamera' voluntarily and intentionally used and caused to be used the mails for mailing, carriage in the mails and delivery with knowledge of its contents of a letter, which is Government's Exhibit No. 3, according to the directions thereon, addressed to Toni Mandernach, a **[136]** housewife, at Odebolt, Iowa 51458, from 1350 North Highland Avenue, Room 4, Hollywood, California 90028, containing an advertisement giving information where, how, from whom, and by what means a magazine entitled 'Bed Play' could be obtained. And it was defendant Pinkus' intention that this letter and its contents be for the personal use of the recipient.

"Four, on or about September 9, 1971, in Los Angeles County, within the Central District of California, defendant William Pinkus, doing business as 'Rosslyn News Company' and 'Kamera' voluntarily and

intentionally used and caused to be used the mails for mailing, carriage in the mails, and delivery with knowledge of its contents of a letter, which is Government's Exhibit No. 4, according to the directions thereon, addressed to Toni Mandernach, a housewife, at Odebolt, Iowa 51458, from 'Kamera,' 1350 North Highland Avenue, Hollywood, California 90028, containing an illustrated brochure advertising sex films, books and magazines. And it was defendant Pinkus' intention that this letter and its contents be for the personal use of the recipient.

"Five, on or about September 9, 1971, in Los Angeles County, within the Central District of California, defendant William Pinkus, doing business **[137]** as 'Rosslyn News Company' and 'Kamera' voluntarily and intentionally used and caused to be used the mails for mailing, carriage in the mails and delivery with knowledge of its contents of a letter, which is Government's Exhibit No. 5, according to the directions thereon, addressed to Jay W. Becker, a retail florist at 93-14 215th Street, Queens Village, New York 11428, from 1350 North Highland Avenue, Room 4, Hollywood, California 90028, containing an illustrated brochure advertising sex films, books and magazines. And it was defendant Pinkus' intention that this letter and its contents be for the personal use of the recipient.

"Six, on or about September 9, 1971, in Los Angeles County, within the Central District of California, defendant William Pinkus, doing business as 'Rosslyn News Company' and 'Kamera' voluntarily and intentionally used, caused to be used, the mails for mailing, carriage in the mails, and delivery with knowledge of its contents of a letter, which is Government's Exhibit No. 6, according to the directions there-

on, addressed to Ben T. Winsor, an Episcopalian minister, at 1701 Crafton Boulevard, Pittsburgh, Pennsylvania 15205, from 'Kamera' 1350 North Highland Avenue, Hollywood, California 90028, containing an illustrated brochure advertising sex films, books and [138] magazines. And it was defendant Pinkus' intention that this letter and its contents be for the personal use of the recipient.

"Seven, on or about September 17, 1971, in Los Angeles County, within the Central District of California, defendant William Pinkus, doing business as 'Rosslyn News Company' and 'Kamera' voluntarily and intentionally used and caused to be used the mails for mailing, carriage in the mails, and delivery with knowledge of its contents of a package, which is Government's Exhibit No. 7, according to the directions thereon, addressed to Hal Waller, Box 1273, San Marcos, Texas 78666, from 'Kamera' 1350 North Highland Avenue, Hollywood, California 90028, containing the magazine entitled 'Bed Play' and illustrated brochures advertising sex films, books and magazines. And it was defendant Pinkus' intention that this package and its contents be for the personal use of the recipient.

"Eight, on or about November 9, 1971, in Los Angeles County, within the Central District of California, defendant William Pinkus, doing business as 'Rosslyn News Company' and 'Kamera' voluntarily and intentionally used and caused to be used the mails for mailing, carriage in the mails, and delivery [139] with knowledge of its contents of a letter, which is Government's Exhibit No. 8, according to the directions thereon, addressed to Hal Waller, Box 1273, San Marcos, Texas 78666, from 1350 North Highland Avenue, Room 4, Hollywood, California 90028, containing an advertisement giving information where, how, from whom, and by what means a film described as No. '613' could be obtained. It was defendant Pinkus' intention that this letter and its contents be for the personal use of the recipient.

"Nine, on or about November 29, 1971, in Los Angeles County, within the Central District of California, defendant William Pinkus, doing business as 'Kamera' voluntarily and intentionally used and caused to be used the mails for mailing, carriage in the mails, and delivery of a package, which is Government's Exhibit 9, according to the directions thereon, addressed to Hal Waller, Box 1273, San Marcos, Texas 78666, from 'Kamera' 1350 North Highland Avenue, Hollywood, California 90028, containing a reel of 8mm movie film identified as No. '613' and illustrated brochures advertising sex films, books and magazines. And it was defendant Pinkus' intention that this package and its contents be for the personal use of the recipient.

[140] "Ten, on or about March 30, 1972, in Los Angeles County, within the Central District of California, defendant William Pinkus, doing business as 'Rosslyn News Company' and 'Kamera' voluntarily and intentionally used and caused to be used the mails for mailing, carriage in the mails and delivery with knowledge of its contents of a letter, which is Government's Exhibit No. 10, according to the directions thereon, addressed to Ben T. Winsor, an Episcopalian minister, at 1701 Crafton Boulevard, Pittsburgh, Pennsylvania 15205, from 1350 North Highland Avenue, Hollywood, California 90028, containing an illustrated brochure advertising sex films, books, magazines and

playing cards. And it was defendant Pinkus' intention that this letter and its contents be for the personal use of the recipient."

We are almost finished.

"Eleven, on or about June 19, 1972, in Los Angeles County, within the Central District of California, defendant William Pinkus, doing business as 'Rosslyn News Company' and 'Kamera' voluntarily and intentionally used and caused to be used the mails for mailing, carriage in the mails, and delivery of the contents of a letter, which is **[141]** Government's Exhibit No. 11, according to the directions thereon, addressed to R. Gauthier, a lieutenant in the Internal Affairs Division, Newark Police Department at 400 North 12th Street, Newark, New Jersey 07107, from 1350 North Highland Avenue, Room 4, Hollywood, California 90028, containing illustrated brochures advertising sex films, books and magazines. And it was defendant Pinkus' intention that this letter and its contents be for the personal use of the recipient."

It is further stipulated that neither side in this case will offer any other evidence relating to the matters covered by the above stipulation.

The stipulation is complete and executed by counsel for the respective parties and defendant.

The Court: Is that the defendant's stipulation?

Mr. Atkins: It is, your Honor.

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STATEMENT OF W. MICHAEL MAYOCK,
ASSISTANT UNITED STATES ATTORNEY

[147] Mr. Atkins: Some of these materials, apparently the United States Attorney feels appeal to deviate groups. If that is the situation, if they are fetish materials or materials that he contends appear to appeal to deviate groups, then in that situation independent proof must be offered as to the deviate character of the materials, and none was offered, and I would have to object to those materials which may or may not appeal to deviate groups.

On that basis, I—

The Court: Are you speaking of homosexual-type material?

Mr. Atkins: Homosexual or whatever counsel alluded to in his opening statement as being the deviate groups.

The Court: Do you have any material that fits in that category, that you know of?

Mr. Mayock: There are some photographs in the material that purports to be homosexual.

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STATEMENT OF NORMAN R. ATKINS,
ATTORNEY FOR DEFENDANT

[170] Mr. Atkins: Your Honor, I intend to ask the Court, move the Court to permit the jury to go to a theater to view "Deep Throat" and "The Devil in Miss Jones," after the testimony of Mr. Williams, Variety Magazine as to the record setting propensities.

The Court: What would be the materiality of that?

Mr. Atkins: As being comparable materials, and the acceptance of such materials in this community to show contemporary community standards and what is tolerated and accepted and is being paid for by $5 admission tickets, an overwhelming number, 500,000, 600,000 people.

Mr. Mayock: Your Honor, the Government would object to that attempt to introduce comparison evidence, that there has been no showing that that would be a valid comparison under the Jacobs standard in this circuit.

And moreover, the purpose for which it is being offered is to show community tolerance, whereas the test in this case has to be community acceptance or impact, not tolerance.

[171] Mr. Atkins: Your Honor, one aspect of acceptance is what is being done and the number of persons who have—

The Court: How can you bring about a comparison between a motion picture of the nature of the type that you suggest you would like for this jury to see and the still pictures that constitute the majority of the exhibits here apart from what, a reel of film, is not a reel in itself as a story connected with it or any plot or anything else that takes on the aspects of "The Devil in Miss Jones," or the other photoplays?

Mr. Atkins: Your Honor, the words of the law are that the material must go substantially beyond the limits of candor. Therefore I'm offering the comparison only in terms of candor, not in comparison of theatrical beauty or excellence. I'm only offering there the candor of the description in such films as "The Devil in Miss Jones" and "Deep Throat" are entirely comparable as compared to the film in this case. And the magazine "Bed Play" also. And the visual material and the brochures as well. I'm only offering those so that the jury can be apprised of the fact that these films are just as candid, just as candid as the material in this case, in all respects.

The Court: I don't see that there is a basis for me to accept your offer as comparable evidence, or to allow this jury to view those pictures. And I will have to reject your **[172]** proposal.

Mr. Atkins: Can this be considered an offer of proof, your Honor?

The Court: Yes, and a denial of it.

Mr. Atkins: May I then, as an alternative, state that I have in my possession a silent 8mm version of "Deep Throat," a silent 8mm version of "Behind the Green Door," and I will have a silent 8mm version of the film "The Devil in Miss Jones," which is from the films that were shown in this area for some three, four years now, and that if your Honor is unwilling to have the jury go there, we could have them see these films in the courtroom here, and at a minimum of expense and time.

The Court: I have not seen the film, and I am willing to look at a representative part of it outside the presence of the jury, to make a determination whether I think that there is any basis of comparability.

But until that is done, I will have to stand upon the denial of the offer of proof that has been just made of record.

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EXCERPT FROM DIRECT EXAMINATION OF WHITNEY WILLIAMS

(By Mr. Atkins)

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[283] Q. And do you work? What is your occupation? A. I'm a newspaper man, I'm on the staff of Daily Variety in Hollywood, the show paper, the show business paper.

Q. How long have you worked for Daily Variety? A. Since 1942.

Q. And what is Variety? A. Variety is a trade paper devoted to the entertainment industry in all phases, motion pictures, TV, everything like that.

Q. All right. In the course of your duties are you in charge of the gathering of box office statistics? A. I gather the majority of the figures, yes.

Q. And have you gathered the statistics concerning the box office grosses of the films "Deep Throat" and the film "The Devil in Miss Jones"? A. Yes, I have.

[284] Q. All right. Do you have them with you there? A. Yes, I have.

Mr. Atkins: Your Honor, could I approach the witness?

The Court: No. What do you want?

Mr. Atkins: I simply want to go over his material with him. I think it would be easier.

The Court: No. I don't want you approaching the witness stand, or any other lawyer doing it.

Q. Mr. Atkins: Mr. Williams, do you have the statistics that you have gathered? A. Yes, I have.

Q. And what are they for the year 1972-73?

Mr. Mayock: Objection, no foundation, your Honor.

The Court: Yes. Lay your foundation so as to show how the statistics are gathered, the reliability of them and all the rest of it.

Q. By Mr. Atkins: Mr. Williams, how do you gather your statistics? A. In these particular cases, I have gathered them from the theater itself.

Q. And? A. The theater, the Hollywood Pussy Cat, which showed "Deep Throat" and the theater, the head of the theaters that showed the other picture.

[285] Q. And how do you put these statistics together? How is it done? A. Well, I talk to them once a week and get the previous week's gross, that is the amount taken in at the box office.

The Court: The monetary gross?

The Witness: The monetary gross.

The Court: Not numbers of people that went in?

The Witness: No. But in the case of "Deep Throat" it was one straight price, $5 a head. So that could be divided into the overall gross.

The Court: We are talking about two pictures, one is "Deep Throat," is that correct?

The Witness: Yes.

The Court: Where was it shown, in one theater in this area or more than one?

The Witness: One theater in Hollywood, the Hollywood Pussy Cat.

The Court: And what was the name of the other picture?

The Witness: "The Devil in Miss Jones."

The Court: Where was that shown?

The Witness: That was shown in three different theaters, also in Hollywood, in Los Angeles.

The Court: What are the names of those theaters?

The Witness: Cine Cienega, Cave Corbin and Yale. They are small theaters, but collectively, I should say that **[286]** they have the seating capacity of around 1,330.

The Court: Do I understand that all of those are adult-type theaters?

The Witness: Yes, they are.

The Court: As I understand it your method of collecting the information is to, once a week, call some officer of the theater and ask him the monetary gross income for the previous week?

The Witness: That's true.

The Court: And you make such a recordation, is that correct?

The Witness: That is correct.

The Court: What do you do? Do you publish those figures somewhere?

The Witness: Yes. We take all the pictures that are, what is known in the first-run in Los Angeles and tell what the prospect is for the week, in Los Angeles.

The Court: Are they relied upon, to your knowledge, in the entertainment industry?

The Witness: Yes.

The Court: Who was it that you think would rely upon those figures?

The Witness: The industry. Because we have a reputation down through the years Weekly Variety, which is the parent company, was started in New York in 1905. And Daily **[287]** Variety, which is owned by Weekly Variety has been in existence since about 1933. And it is regarded as sort of the Bible of show business. It is regarded as that.

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DIRECT EXAMINATION OF MR. WHITNEY WILLIAMS

(Resumed)

[293] By Mr. Atkins:

Q. Mr. Williams, do you have before you copies of your compilations that appear in articles in Variety? A. Yes, I do.

Q. Would they represent your summary of your compilations? A. Yes, they do.

Q. Would you take the earliest one that you have—

Mr. Atkins: Your Honor, I have the original Variety, that I'm told the only one that this witness has retained of **[294]** these earlier editions, and I've made Xerox copies of them, of the pertinent portions.

And I would like to have the—I would like to show opposing counsel the originals and ask if he would agree that the Xerox copies could be substituted for the originals.

Mr. Mayock: Your Honor, preserving all of the objections already raised, the Government would have no objection to substituting Xerox copies for the original Variety.

The Court: All right.

Q. By Mr. Atkins: Now taking your earliest article, Mr. Williams, what were the box office grosses for "Deep Throat" and for what period of time? A. For 52 weeks in the year 1973 the gross was two million six hundred seventy-two thousand four hundred seventy-six.

Q. And do you have the article in which that appeared? A. Beg pardon?

Q. Are you reading from the article in which that appeared? A. Yes, in the issue of January the 3rd, 1974 in Daily Variety.

Q. And do you have a Xerox copy of that? A. Yes, I have.

Q. Do you have that in your hand? A. I have it here.

Mr. Atkins: Your Honor, could that be marked **[295]** Defendant's next in order?

The Court: Yes.

The Clerk: Defendant's D.

(The document referred to was marked Defendant's Exhibit D for identification.)

Q. By Mr. Atkins: Do you have, Mr. Williams, do you have a later report on the grosses of "Deep Throat"? A. Yes. In the issue of June the 14th, 1974, at the conclusion of the run of "Deep Throat" at the Hollywood Pussy Cat, it was an 81 week run, and the total for the 81 weeks was three million two hundred seventy-two thousand seven hundred thirty-six dollars.

The Court: The 81 weeks include the 52 weeks in 1973, doesn't it?

The Witness: Yes, it does. It includes the first five weeks in '72, 52 weeks in '73, and I believe 24 weeks in 1974.

The Court: So you said that in 1973 it grossed two million six hundred seventy-two thousand?

The Witness: Yes.

The Court: And the last figure, the last three million dollar figure you gave us includes the two million dollar figure earlier, is that right?

The Witness: Yes.

The Court: All right. So the total gross for the **[296]** entire run was three million two hundred seventy-two thousand dollars.

The Witness: Yes.

Q. By Mr. Atkins: All right now, do you have any current total up to this date, or near up to date or beyond that? A. Well, now in the Weekly Variety, which is published in New York each week, they have a section called the 50 top grossing films, and the—

The Court: Now, counsel, I'm going to have to sustain the objection to this unless you can show that this witness has had some participation in accumulating those figures.

Q. By Mr. Atkins: Well, have you had any participation in the figures you are about to recount? A. The only participation I would have in that is that they include the Los Angeles figures.

The Court: Yes. I will have to sustain the objection to that.

Mr. Atkins: All right.

Q. Now, Mr. Williams, do you have any compilations of your own with regard to "The Devil in Miss Jones," the film "The Devil in Miss Jones" and the grosses of

that film? A. Well, in the January 3rd, 1974 issue of the 10 highest grossing films, of the year, in Los Angeles, "The Devil in Miss **[297]** Jones" is listed in No. 3 position.

Q. Does it have a gross for that? A. Yes, in 37 weeks it grossed one million two hundred nine thousand one hundred eighty dollars.

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[300] Q. By Mr. Atkins: Mr. Williams, when you mentioned that "Deep Throat" was one, No. 1, on a list of ten, and "The Devil in Miss Jones" was No. 3 on a list of ten, who compiled the list of ten that you were referring to? A. I did.

Q. Was that list of ten made up from your own compilations of grosses for the year? A. It was compiled from the year's gross.

Q. So that this is, in effect, the list that you compiled from your own statistical information? A. From my own records.

Q. All right. And would you read that list for us, the top ten that you have listed there that you referred to before. A. The four top?

[301] Q. The ten top, the ten films that you said were comprised in the ten top grossers. A. "Deep Throat," is No. 1, "Billy Jack," the re-issue of "Billy Jack" is No. 2. "The Devil in Miss Jones" is No. 3. "The Last Tango in Paris," No. 4. "Paper Moon," No. 5, "West World" No. 6, "The Day of the Jackal" No. 7, "Live and Let Die" No. 8. "Enter the Dragon"—I may have missed one here. "Enter the Dragon" is No. 9 and "Heartbreak Kid" is No. 10.

Q. Now one last question, Mr. Williams, your figures with regard to these two films, "The Devil in Miss Jones" and "Deep Throat" have to do only with the Los Angeles area, is that correct? A. Just in the Los Angeles area.

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EXCERPTS FROM CROSS EXAMINATION OF DR. MICHAEL H. WARD

By Mr. Mayock:

[396] Q. So, could what a child reads or sees influence his sexual direction, if that was culturally provided him? A. Yes, but it has to bear some consistency to the overall cultural and environmental context. A child seeing one thing or reading one book or reading a series of books that present sexual mores inconsistent with the overall mores around him would probably not be influenced greatly by them. What the child's parents do with respect to sexual behavior, what seems to be expected from him in terms of his peer groups, and so forth, as well as his biological complement would appear to be the major determinants.

A. [sic] Could what we might term a borderline child be influenced to go over into later deviate behavior by virtue **[397]** of what he sees or reads?

Mr. Atkins: Your Honor, may we approach the bench?

The Court: For what purpose?

Mr. Atkins: I think that we should discuss this point. Children have not been involved in this case, your Honor.

The Court: Has nothing to do with the appropriateness of cross examination.

The objection is overruled.

Read the question to the witness, please.

(The question was read.)

The Witness: What do you mean by borderline child, in what regard?

By Mr. Mayock:

Q. For one who is, say, on the cultural cusp, if you will, his family is providing him with certain materials

that he may read if he chose; he is marginal as far as what his sexual direction is going to be. A. It appears at first glance to be an easy question to answer, but there are really a lot of variables involved; what is the age of the child? What has been his prior experience? What do you mean by cultural cusp? What are his parents' tendencies? If I elucidate each one of those I could make some prognosis about the child's development.

Q. You feel children shouldn't see sexual materials **[398]** until they reach a certain age? A. I generally do, yes.

Q. What would that age be? A. Well, we are talking about the late adolescence, late teens. It's reasonable to me to forbid people under 18 years of age from ready access to sexually explicit material. The basic reason is I think the psychological and physiological complements are really in too much of a state of flux in the early teens, and material could have a disproportionate influence on what happens to the child.

Other people feel, and I can agree to a certain extent, that monitored exposure to sexually explicit material, even in younger children is helpful, and I'm sure that is the case in the sense of planned sexual education programs. But in general I'm in agreement with the notion that adulthood would be a requisite for the ready availability of sexually explicit material.

Q. So then, it would not be a psychologically or sexually healthy thing for a child to view the exhibits in this case ? A. Probably not in general.

Mr. Atkins: Same objection, your Honor.

The Court: I think so, sustained.

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STATEMENT OF NORMAN R. ATKINS,
ATTORNEY FOR DEFENDANT

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[537] Mr. Atkins: No, your Honor. I want to offer to show the jury the films "Deep Throat," and "The Devil in Miss Jones."

The Court: What for?

Mr. Atkins: As comparable materials, and also in amplification of the testimony of Mr. Williams from Variety Magazine as to the numbers of people who saw that, these two [538] films.

The Court: No, I'm not going to permit that, Mr. Atkins.

Mr. Atkins: May they be marked, your Honor? I'm offering them. I might say this—

The Court: Yes, I will let them be marked, and they may be received for any appellate purposes that may follow.

Mr. Atkins: Well, there is another purpose, your Honor; the other purpose that I haven't yet stated is that each Court must make its own specific determination as to the obscenity vel non of the material, and if it becomes appropriate, I will be asking your Honor to make a determination of your own, and I would then ask that your Honor watch these movies, "The Devil in Miss Jones" and "Deep Throat" in order to make a comparison of them with the materials in evidence here so that your Honor can deal with that issue.

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[539] Mr. Atkins: Your Honor, may I make an offer of proof with regard to those, K and L, the films?

The Court: Yes.

Mr. Atkins: That they are the silent versions of the films shown in the Los Angeles area and throughout the Central District of California, that they are 8mm versions of [540] the film shown in the theaters, which are both the theater size, that they exemplify in detail the exactly comparable descriptions of sex and oral-genital sex and natural sex and unnatural sex of all kinds and descriptions, which make them absolutely comparable to the materials involved in this case in all respects. And that therefore these films would be of great aid to the jury to determine—to help them determine what the standards are with regard to acceptance of explicit sexual depictions in the Central District of California.

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[541] The Court: Mr. Atkins, that is true, is it not, that these are not films of the full length shown in the theaters, but that they are reduced, or altered versions.

[542] Mr. Atkins: Your Honor, may I say yes, but may I amplify?

The Court: Yes.

Mr. Atkins: The answer to that is yes, but I have offered to the Court before that at the defense expense we would take the jury to the theater where the full length sound-color versions are showing right now and are readily accessible, and at the defense expense we will pay for the bus and the admission and the popcorn and whatever else. We will take this jury to the movies there if your Honor would rather do that.

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EXCERPT FROM DIRECT EXAMINATION OF DR. JAMES RUE

By Mr. Mayock:

* * * * *

[552] Q. Have you had occasion to study and have professional contact with members of normal sexual groupings and deviate sexual groupings during your practice as a counsellor?

Mr. Atkins: Your Honor, may we approach the bench very briefly?

The Court: Yes.

(The following proceedings were held at the bench:)

Mr. Atkins: I think this would be an appropriate time **[553]** to object to the offer of any evidence regarding the deviate sexual groups. Again, that should have been done on the Government's case in chief if it was going to be done at all. And—

The Court: Is that a subject that you intend to go into?

Mr. Mayock: There will be, yes, there will be discussion of that. Defendant's own witnesses talked about deviate sexual—

The Court: I think they did.

Mr. Atkins: The only respect in which they did was in cross-examination as to their expertise, and not as a matter of offer of proof on that subject, your Honor. I was not offering proof, and they did not offer any.

The Court: I won't preclude him from going into the subject, but I leave it open to you to make what you may consider to be proper objections to any particular questions or area of inquiry.

* * * * *

[571] Q. What does the material contain which you examined, these exhibits? Not necessarily those in front of you, just in general, what was the general subject matter? A. I think that the total thrust of the exhibits, the material that I have viewed have dealt with sex, but a particular kind of sex; sex without love, sex without tenderness, sex without caring, casual sex, group sex, homosexual sex.

[572] Q. In going through these exhibits, did you have occasion to prepare any sort of a summary or synopsis of what was depicted in various exhibits? A. Yes. The first material that I saw happened to be Xeroxed copies of the material, black and white. And from these I did sort of my own little summary of what I saw or felt was in evidence to me other than intercourse.

Q. What sort of breakdown did you have as to types of sex that you saw in Exhibits 1 through 11? A. May I ask a question? Do Exhibits 1 through 11 include this magazine?

Q. Yes, it does. A. Does it include the film?

Q. Yes, it includes the film, it includes all of that. A. All right. The classifications that I was checking to find out the incidents in the publications were one, oral sex, two, group sex, depictions of this, three, homosexual sex, including lesbianism, four, sex with animals, five, extraneous devices that might be introduced in the process of sex.

The next category I listed was anal sex. And then the last two were masturbatory sex, or masturbation. And finally sadomasochism, or sado-bondage type sex.

Q. And did you, in going through the material, classify as to each exhibit what was reflected in the particular exhibit **[573]** as to those groupings you have listed? A. I went through the materials and numbered the exhibits and then just put little checks when I found that

that particular form or type of sex was presented. And I made a little chart just so that it would give me an idea, for example, of the exhibits, how many of the exhibits had anything to do with animal, how many of the exhibits had anything to do with anal intercourse, how many with a foreign device, and so forth.

Q. Doctor, do you, as a result of your examination, the preparation of this list, do you have an opinion as to whether the dominant theme, the dominant theme of the material taken as a whole appeals to the prurient interest in sex of either the average person or a clearly defined sexually deviate group?

Mr. Atkins: Same objection, your Honor, I have made before on the ground that it's improper rebuttal in general, and in particular that it refers to a deviate group and again as to the doctor's qualifications.

The Court: Those objections are overruled.

The Witness: I do.

Q. By Mr. Mayock: What is that opinion? A. That this material does appeal to the prurient interest of the average person in the community as well as deviate particular groups.

Q. Would you please, just talking about the average person [574] in the community, sets forth the reasons for that opinion that you arrived at, and if you will, perhaps you could start by using the magazine "Bed Play," as an example. That is Exhibit 7. A. Well, there are many regards, but the average person in California, or any other state of the union, does not engage in group sex, the average person does not. Sexually deviate groups will do this.

This is depicted throughout just about all of the exhibits in this case.

The average person does not utilize foreign devices in sexual relations.

The average person does not engage in sadomasochistic games or bondage forms of sex play.

Anal intercourse is not a generally acceptable form of intercourse for the average person.

Oral sex probably, I would exclude from the other categories in that I think that it is probably engaged in at some time or other, or even possibly regularly by the average couple at some time in the life of their relationship.

Q. Doctor, in coming to the conclusion that the material appears to you to appeal to a prurient interest in sex and morbid or shameful interest in sex, did you pay attention to what the material showed as a story line, if any? A. Well, the nearest thing to a story line that I can [575] find is in the short film where it would appear that one couple comes to the residence of another couple. But that is as near as it comes to the totality of the exhibits. It sort of fades there because it's sort of like tag sex; she has relations with one and the other one gets mad and goes home, or something, then now it's time for the other man to have sex with her. These are not average circumstances by any stretch of the imagination.

Mr. Atkins: Your Honor, could I have that last answer re-read, please?

The Court: Yes.

(The record was read.)

The Witness: Thank you, your Honor.

Q. By Mr. Mayock: Dr. Rue, do you use as one of your criteria in evaluating whether the matter appealed to, predominantly to a morbid or shameful interest in sex by looking to see what the focus of the individual pictures was as to whether it was on, say, the genital area? A. Well, throughout the entirety of the material in question are extreme closeups of the genitalia.

Q. Could I direct your attention to the inside back cover of the Exhibit "Bedplay," Exhibit 7-A. Therein appears a photograph mostly of a female's face and hair and a penis with what appears to be, having ejaculated and sperm running down the side of the woman's face towards her ear. Do you see that exhibit in front of you, that portion of it? **[576]** A. Yes, I do.

Q. In your opinion does the focus of the pictures on the genitalia have, in this situation, have a relationship to its classification possibly as being an appeal to the prurient interest of the viewer? A. It's the whole purpose, the whole technique of presenting the material, as I would see it, is to do the extreme closeup, show spermatozoa flowing forth from the penis, let this drip across the mouth of the woman, meant to be an appeal to the shameful or the morbid.

Three people in the picture before me, here are three people having a sexual relationship. One would appear the male has the penis in the anus of one woman, the other woman is stroking the testes of the male, and mouthing the breast of the other woman. A typical example again of appealing to arouse the shameful or morbid, because if it didn't, if it didn't arouse that shameful or morbid, then this kind of sexual behavior for the average person would be natural, and it is not.

Q. Doctor, directing your attention to the first page or the cover page of Exhibit 7-A, "Bedplay," where appears two women, I can't tell, but at least one of them has sperm on the side of her face near her mouth. They are both lying on, around the hip area of a male. What would you say about the focus of that particular photograph as to whether it's intended **[577]** to appeal to the morbid or shameful interest of the viewer in sex. A. Just the fact that the camera angle itself has the penis where it occupies almost a fourth of the page, with three adult

figures in that picture, I think is a very graphic means used by a photographer to accentuate the unhealthy, the abnormal.

Q. Looking through this magazine "Bedplay," are the poses of the individuals depicted therein natural or strained or unnatural, or what? A. Well, the inside cover, which I described previously, with the three people engaging in sex, I think is an unhealthy, unnatural form of sexual play.

The picture right above that where the male is licking the anus of the woman while she mouths the penis, I don't think it is typical at all in terms of love making.

The masturbatory scenes where the woman is using fellatio, which is mouthing the penis of the male while she masturbates herself, no, not—again the same classification.

The next page has the scene of a woman attempting to lick her own breast while a reverse picture of attempted intercourse is supposedly taking place.

The next page to that, some sort of a G-string is being pulled down by the man again as he licks the anus, and again the continuation of group sex, which is so predominant in **[578]** this material would again suggest that they are striving as best they know how to appeal to the unnatural, to the unwholesome side of sex, which would have particular interest, particularly to deviate groups, the homosexual one being obvious.

But again even to the curio[illegible]f the average person who might look at it there m[illegible]be, certainly would be a curiosity to look at it. Bu[illegible]hat do[illegible]'t necessarily mean it's something that would be acceptable to that person.

Q. Have you had any clinical experience, doctor, in conjunction with your counselling that would illustrate the effects of the viewing of matter of a nature similar

to this on the viewer? A. It happens to be something that I have followed very closely for the past 15 years, and have documented cases wherein the use of various forms of obscenity have had deleterious effect upon the marital relationship, or in the minds of the young person who may be contemplating marriage.

Mr. Atkins: Move to strike as to young people.

The Court: Overruled. The motion is denied.

The Witness: I have a case at the present time where the father—

Mr. Atkins: Same objection, your Honor, except that in a different form. Move to strike, because apparently these are isolated cases, and his testimony is not directed at the **[579]** average person.

The Court: The motion is denied.

The Witness: They are average cases of sexual disfunction of this particular category.

In the case that I'm currently dealing with the father has molested his own daughter after having come from an adult book store, and a history of seeking out the so-called—

Mr. Atkins: Move to strike, your Honor, and move for a mistrial.

The Court: The motion is denied.

Proceed, sir.

The Witness: I have many times documented the fact that when one's spouse can talk the other spouse into partaking in viewing obscenities, that these almost inevitably lead to a worsening of the sexual relationship between the husband and the wife, and have often ended up in divorce.

A case in particular that is typical of this kind of case is when the husband kept prevailing upon his wife to go with him to an X-rated, so-called X-rated motion picture, and he brought magazines

home to prepare her. And she did go to the X-rated movie, and he forced her to go to the second one. She became—she was already frigid, meaning she is unable to reach organism, [sic] now she will hardly have sex with him because this has so upset her emotionally in light of what her vision **[580]** of love and tenderness and kindness and commitment is, that it's done a great disservice to this particular couple.

Q. By Mr. Mayock: Doctor, looking through this magazine "Bedplay" Magazine, do you see any of these qualities you just named, love, tenderness, or affection? A. I don't find it in any of the exhibits.

Q. Doctor, in determining whether there is a prurient appeal as to predominant theme of the matter in question, do you also look at the language that accompanies the text? A. Yes. I noted for example, they are offering for sale in, I think it is Exhibit 8, a publication called "Female Pedophilia." Pedophilia is sex with a child. I noted another one, I don't remember which exhibit it's in, but I noted another one where it has to do with the elderly, where the picture looks like, although I'm not exactly certain, the picture, Xeroxed copy looks like a young girl, certainly under the age of 18, mouthing the penis of a man that looks like he's 70 years, 75.

Q. Could you look at Exhibit 11-A, and looking on that page on the right upper quarter do you see an advertisement for a film called "Dirty Old Man?" A. Yes, that is the one that I had reference to, yes.

Q. Is that Exhibit before you more clear than— A. Well, I'm looking again at the Xerox copy. I don't have the, unless it's—

[581] Q. The original is in front of you. A. Then I am convinced, not surmising that it looks like about a 16, 15 year old girl with a man at least 70.

Q. What would be the appeal of that particular photograph that advertises a movie? A. I think to a deviate group that might be described as a sociopathic type of person, which we would call a character disorder. These are people who have little conscience of any type in terms of what is right or wrong in their mind. It's just complete themselves, pleasurize themselves. That would appeal to that particular large grouping of people, and these are very ambulatory people; people working jobs, and so forth, but who have this particular kind of orientation or hangup about guilt or a conscience.

Q. Doctor, directing your attention back to Exhibit 7-A, the "Bedplay" Magazine, and turning to the pages therein, wherein it's captioned "In the Front Door and out the back," there is attention involving a hero of the film, "Flash Cremon," and underneath that is large language as follows: "We counted and no less than 35 shots dripped from the silver screen and all come from old flasheroo."

Skipping a line, "Fortunately the producers found look alike stud-ins for a squirt here and there. Certainly different work for extras in this film."

Now, could consideration of that language operate as **[582]** part of the basis for your opinion that the predominant theme of the matter was to a morbid or shameful interest in sex? A. Yes. I remember reading that. I do not have that before me. I wasn't able to locate it, but I remember reading that.

And I think again there is a rather graphic sort of dramatic appeal toward this large group of people that I put in that particular classification of borderline in terms of conscience or any feeling about right or wrong.

And then in particular having to do with those particular groups such as men who, or women who would sexually molest a child. That appeal is in this literature.

Q. Doctor, turning your attention to Exhibit 9, do you see that before you in the original form? A. 9-B maybe? 9-C maybe, or 9-D?

Q. Well, let me start with a specific. Why don't we start with 9-E? A. Okay.

Q. Do you see there on a photograph of a female apparently engaged in sex with what appears to be a German Shepherd dog? A. Yes.

Q. In your opinion, doctor, is that a film that would appeal to the prurient interest of the person who would view that, or that photograph? **[583]** A. Yes, of the average person in the community as well as sexually deviate groups.

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[588] Q. By Mr. Mayock: Doctor, is the test for prurience the actual appeal of the material, as you understand that test? A. Yes.

Q. And does this material appeal to the prurient interest of the average person in the community? A. Yes.

Q. Does it appeal to the prurient interest of a member of **[589]** a sexually deviate group? A. Yes.

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STATEMENT OF JUDGE DAVID W. WILLIAMS

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[693] The Court: • • • I think you also wanted to put in the record the fact that I had indicated that I would see parts of "The Devil in Miss Jones" and "Deep Throat" and rule concerning whether I would permit this jury to see the film that has been offered. And I have seen a part of the film and feel—

Mr. Atkins: Which film?

The Court: Of "Deep Throat." And feel that it would not be proper for the films that have been offered to be shown this jury.

I will reject that offer.

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[785] THE COURT'S CHARGE

The Court: Members of the jury, now that you have heard the evidence and the argument, it becomes my duty to give you the instructions of the court as to the law applicable to this case.

It is your duty as jurors to follow the law as stated in the instructions of the court, and to apply the rules of law so given to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law ought to be, [786] it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the court; just as it would be a violation of your sworn duty, as judges of the facts to base a verdict upon anything that the evidence indicates.

Justice through trial by jury must always depend upon the willingness of each juror to seek the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment, and the denial made by the "Not guilty"

plea of the accused. You are to perform this duty without bias or prejudice as to any party.

The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the accused and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the court and reach a just verdict, regardless of the consequences.

The law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with a "clean slate"—with no evidence against him. And the law permits nothing but legal evidence presented before [787] the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

It is not required that the Government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

A reasonable doubt exists whenever, after careful and impartial consideration of all the evidence in the case,

the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge. So, if the jury views the [788] evidence in the case as reasonably permitting either of two conclusions—one of innocence, the other of guilt—the jury should of course adopt the conclusion of innocence.

An indictment is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused.

There are two types of evidence from which a jury may properly find a defendant guilty of a crime. One is direct evidence—such as the testimony of an eyewitness. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

Statements and arguments of counsel are not evidence in the case, are not evidence, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, you must, unless otherwise instructed, accept the stipulation as evidence, and regard that fact as proved.

The court may take judicial notice of certain facts or events. When the court declares it will take judicial notice of some fact or event, you may accept the court's [789] declaration as evidence and regard as proved the fact or event which has been judicially noticed, but you are not required to do so since you are the sole judge of the facts.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them; and

all exhibits received in evidence, regardless of who may have produced them; and all facts which may have been admitted or stipulated; and all facts and events which may have been judicially noticed; and all applicable presumptions stated in these instructions.

Any evidence as to which an objection was sustained by the court, and any evidence ordered stricken by the court, must be entirely disregarded.

Unless you are otherwise instructed, anything you may have seen or heard outside the courtroom is not evidence, and must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in the light of experience.

If a lawyer asks a witness a question which contains [790] an assertion of fact you may not consider the assertion as evidence of that fact. The lawyer's statements are not evidence.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

A presumption is a rule of law which permits the jury to find the existence of one fact from proof of another fact.

A presumption may be overcome by evidence. Your duty is to determine the facts on the basis of all of the evidence. You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's testimony, motive and state of mind, and demeanor and manner while on the stand. Consider the witness's ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at **[791]** all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

The testimony of a witness may be discredited or impeached by a showing that he previously made statements which are inconsistent with his present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness, and not to establish the truth of the statements. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to **[792]** distrust such witness's testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

An act or an omission is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

The law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn, from the failure of a defendant to testify.

As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those who we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matter, in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and **[793]** experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

The testimony of an accountant or charts or summaries prepared by him, and admitted in evidence, are received

for the purpose of explaining facts disclosed by books, records, and other documents which are in evidence in the case. Such charts or summaries are not in and of themselves evidence or proof of any facts. If such charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, the jury should disregard them.

In other words, such charts or summaries are used only as a matter of convenience; so if, and to the extent that, you find they are not in truth summaries of facts or figures shown by the evidence in the case, you are to disregard them entirely.

The law does not require the prosecution to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require the prosecution to produce as exhibits all papers and things mentioned in the evidence.

However, in judging the credibility of the witnesses who have testified, and in considering the weight and effect of **[794]** all evidence that has been produced, the jury may consider the prosecution's failure to call other witnesses or to produce other evidence shown by the evidence in the case to be in existence and available.

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence, and no adverse inferences may be drawn from his failure to do so.

To constitute the crime charged in the indictment there must be the joint operation of two essential elements, an act forbidden by law and an intent to do the act.

Before a defendant may be found guilty of a crime the prosecution must establish beyond a reasonable doubt that under the statute described in these instructions de-

fendant was forbidden to do the act charged in the indictment, and that he intentionally committed the act.

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind. It is ordinarily reasonable to infer that a person intends the natural and probable **[795]** consequences of acts knowingly done or knowingly omitted.

It is not necessary for the prosecution to prove that the defendant knew that a particular act or failure to act is a violation of law. Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids and what the law requires to be done. However, evidence that the accused acted or failed to act because of ignorance of the law, is to be considered by the jury, in determining whether or not the accused acted or failed to act with specific intent, as charged.

Intent and motive should never be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted.

Personal advancement and financial gain are two well-recognized motives for much of human conduct. These laudable motives may prompt one person to voluntary acts of good, another to voluntary acts of crime.

Good motive alone is never a defense where the act done or omitted is a crime. So, the motive of the accused is immaterial except insofar as evidence of motive may aid determination of state of mind or intent.

An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or **[796]** other innocent reason.

The purpose of adding the word "knowingly" was to insure that no one would be convicted for an act done because of mistake, or accident or other innocent reason.

As stated before, with respect to acts charged in this case, specific intent must be proved beyond reasonable doubt before there can be a conviction.

During the course of a trial, I occasionally ask questions of a witness, in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions may have related. Remember at all times that you, as jurors, are at liberty to disregard all comments of the court in arriving at your own findings as to the facts.

It is the duty of the court to admonish an attorney who, out of zeal for his cause, does something which is not in keeping with the rules of evidence or procedure.

You are to draw no inference against the side to whom an admonition of the court may have been addressed during the trial of this case.

It is the duty of the attorney on each side of a case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. You should not show prejudice against an attorney or his client because the attorney has made objections.

[797] Upon allowing testimony or other evidence to be introduced over objection of an attorney, the court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence. As stated before, the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

When the court has sustained an objection to a question addressed to a witness the jury must disregard the question

entirely, and may draw no inference from the wording of it, or speculate as to what the witness would have said if he had been permitted to answer the question.

The indictment in this case is in eleven counts.

Count 1 charges that on or about July 28, 1971, in this judicial district, defendant William Pinkus knowingly used, and caused to be used, the mails for mailing, carriage in the mails, and delivery of a letter according to the instructions thereon addressed to Calin R. Coburn, 4141 Eastern, No. 1, Las Vegas, Nevada from 1350 North Highland Avenue, Hollywood, California, containing an obscene illustrated brochure advertising sex films, books and magazines.

As to the remaining counts I am going to summarize them in a fashion that will be understandable to you.

Count 2 charges that on or about July 28, 1971, within this judicial district, the defendant William **[798]** Pinkus knowingly used, and caused to be used the mails for mailing, and for the delivery of a letter according to the directions thereon addressed to Miton Town, in Rochester, New York, from the Highland Avenue address in Hollywood, California, containing an advertisement giving information where, how, from whom, and by what means an obscene magazine entitled "Bed Play" could be obtained.

Count 3 charges that on or about July 28, 1971, in this judicial district, the defendant William Pinkus caused to be used the mails for mailing and the delivery of a letter according to directions, addressed to a Toni Mandermach in Odebolt, Iowa, from the Highland Avenue address in Hollywood, containing an advertisement giving information where, how, from whom, and by what means an obscene magazine called "Bed Play" could be obtained.

Count 4 charges that on or about September 9, 1971, in this judicial district, the defendant William Pinkus caused to be used the mails for mailing and the delivery

of a letter according to the directions, addressed to Toni Mandermach in Odebolt, Iowa, from the Highland Avenue address in Hollywood, containing an obscene illustrated brochure advertising sex films, books and magazines.

Count 5 charges that on or about September 9, 1971 in this judicial district, the defendant William Pinkus knowingly caused the mails to be used for the delivery of a **[799]** letter addressed to Jay W. Becker, Queens Village, New York, from the Highland Avenue address in Hollywood, California, containing an obscene illustrated brochure advertising sex films, books and magazines.

Count 6 charges that on or about September 9, 1971, in this judicial district, defendant William Pinkus caused the mails to be used for the delivery of a letter addressed to Ben T. Winsor in Pittsburgh, Pennsylvania, from the Highland Avenue address in Hollywood, California, containing an obscene illustrated brochure advertising sex films, books and magazines.

Count 7 charges that on or about September 17, 1971, in this judicial district, the defendant William Pinkus caused the mails to be used for the delivery of a package delivered to Hal Waller, San Marcos, Texas, from the Highland Avenue address in Hollywood, containing an obscene magazine entitled "Bed Play" and obscene illustrated brochures advertising sex films, books and magazines.

Count 8 charges that on or about November 9, 1971, in this judicial district, defendant William Pinkus caused the mails to be used for delivery of a letter addressed to Hal Waller in San Marcos, Texas, from the Highland Avenue address in Hollywood, California, containing an advertisement giving information where, how, from whom, and by what means an obscene film described as No. "613" could be obtained.*

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*The next numbered page in the original transcript is 801.

[801] Count 9 charges that on or about November 29, 1971, in this judicial district, defendant William Pinkus caused the mails to be used for delivery of a package addressed to Hal Waller, San Marcos, Texas, from the Highland Avenue address in Hollywood, California, containing a reel of 8-millimeter obscene movie film identified as No. "613" and obscene illustrated brochures advertising sex films, books and magazines.

Count 10 charges that on or about March 30th, 1972, in this judicial district, defendant William Pinkus caused the mails to be used for delivery of a letter addressed to Ben T. Winsor, Pittsburgh, Pennsylvania, from the Highland Avenue address in Hollywood, California, containing an obscene illustrated brochure advertising sex films, books, magazines and playing cards.

Count 11, the last count, charges that on or about June 19, 1972, in this judicial district, defendant William Pinkus caused the mails to be used for delivery of a letter directed to R. Gauthier, Newark, New Jersey, from the Highland Avenue address in Hollywood, California, containing obscene illustrated brochures advertising sex films, books, and magazines.

Section 1461 of Title 18 of United States Code, under which this action is brought, this indictment is returned, provides in part that: "Every obscene, lewd, lascivious, **[802]** indecent, filthy or vile article, matter, thing, device or substance; every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such matters, articles or things may be obtained is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared

to be unmailable, or knowingly causes to be delivered by mail according to the directions thereon, shall be guilty of an offense against the laws of the United States."

Three essential things are required to be proved in order to establish the offense charged in Counts 4, 5, 6, 7, 9, 10 and 11 of the indictment:

FIRST: That the advertisements, film and photographs mentioned in those counts are obscene, as that term will be defined for you in my instructions.

SECOND: That the defendant willfully deposited, or caused to be deposited, letters or parcels containing such obscene advertisements, film and photos, for mailing and delivery by the Post Office Department of the United States.

THIRD: That the defendant knew that the letters contained such obscene advertisements at the time the letters **[803]** were deposited for mailing and delivery.

You are instructed that you must find the Government has proved the second and third requirements, since the defendant has stipulated to them.

Three essential things are required to be proved in order to establish the offenses charged in Counts 1, 2, 3 and 8 of the indictment.

FIRST: The advertisements or notices give information, directly or indirectly, where, or how, or from whom, or by what means certain pieces of obscene material might be obtained.

SECOND: The defendant willfully deposited, or caused to be deposited, letters containing advertisements or notices for mailing and delivery by the Post Office Department of the United States, and

THIRD: That the defendant knew that the letters contained such advertisements or notices at the time the letters were deposited for mailing and delivery.

You are instructed that you must find the Government has proved the second and third requirements since the defendant has stipulated to them.

As to the first requirement it charges that advertisements giving information as to how and from what source obscene material might be obtained. In order to find the defendant guilty under Counts 1, 2 and 3 you must first **[804]** determine that the matter advertised, that being "Bed Play" magazine, was obscene in accordance with the instructions given by this court.

As to Count 8, in order to find the defendant guilty you must find that film No. "613", the one that was shown you earlier in this trial, was in fact obscene according to the instructions given you by this court, and was the subject of the advertisement.

The gist of the offense alleged in the indictment is the charge that the defendant willfully misused the United States mail for the delivery of obscene photographs or pictures, or for the delivery of information where, how, from whom, and by what means obscene materials could be obtained.

"Obscene" means something which deals with sex in a manner such that the predominant appeal is to prurient interest; which, when considered as a whole, and not part by part, appeals to prurient interest in a way or manner substantially beyond the acceptable limits of candor in dealing with matters relating to sex, as established at the time of its dissemination by the current standards of the community as a whole, and which is utterly lacking in redeeming social value or importance.

An appeal to prurient interest is an appeal to a morbid interest in sex, as distinguished from a candid interest **[805]** in sex.

The constitution of the United States protects the right of the individual to freely publish and distribute magazines,

films, books and material on all subjects, including the subjects of sex and nudity. Thus, sex and nudity may be freely portrayed and discussed in novels, films, magazines, medical texts, psychological works, artistically and photographically.

Freedom of expression is fundamental to our system, and has contributed much to the development and well-being of our free society. In the exercise of the constitutional right to free expression which all of us enjoy, sex may be portrayed and the subject of sex may be discussed, freely and publicly, so long as the expression does not fall within the area of obscenity. However, the constitutional right to free expression does not extend to the expression of that which is obscene under the law as I have stated it to you.

With regard to the three essential elements just mentioned, you are hereby instructed that in order to find the materials involved in the within case legally obscene the materials must be found to violate all three of the stated elements. Thus, if you should find, for example, that the materials did appeal to the prurient interest and did violate contemporary community standards but was not "utterly without redeeming social importance" you must acquit. **[806]** Likewise if, for example, the materials did violate contemporary community standards and was "utterly without redeeming social importance" but did not appeal to the prurient interest, you must acquit. The point is the materials must violate all three of the stated three essential elements in order for you to find that it is legally obscene.

In order to support a finding of obscenity, three elements must be found. These three elements are reflected in the following three tests:

The first test to be applied, in determining whether a given picture is obscene, is whether the predominant

theme or purpose of the picture, when viewed as a whole and not part by part, and when considered in relation to the intended and probable recipients, is an appeal to the prurient interest of the average person of the community as a whole or the prurient interest of members of a deviant sexual group at the time of mailing.

The mere fact that a picture of a nude woman may have some appeal to prurient interest does not meet the test. The appeal to prurient interest must be the predominant or principal appeal of the picture. In other words, the principal appeal of the picture must be to a morbid interest in sex, as distinguished from a candid interest in sex.

In applying this test, the question involved is not how the picture now impresses the individual juror, but rather, **[807]** considering the intended and probable recipients, how the picture would have impressed the average person, or a member of a deviant sexual group at the time they received the picture.

Thus the brochures, magazines and film are not to be judged on the basis of your personal opinion. Nor are they to be judged by their effect on a particularly sensitive or insensitive person or group in the community. You are to judge these materials by the standard of the hypothetical average person in the community, but in determining this average standard you must include the sensitive and the insensitive, in other words, you must include everyone in the community.

It is a matter of common knowledge, of which the court takes judicial notice, that people differ widely in their tastes with regard to the propriety of certain pictures. What may appear to some people to be bad taste or offensive may appear to be amusing or entertaining to others. Obscenity is not a matter of individual taste. The personal opinion of a juror as to the material here in question

is not the proper basis for a determination whether or not the material is obscene. As stated before, the test is how the average person of the community as a whole, that being the Central Judicial District of California, would have viewed the material at the time it was mailed.

[808] In determining community standards, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men, women and children, from all walks of life.

If the predominant appeal of the pictures in question here, taken as a whole is an appeal to the normal interest in sex of the average person, the jury should acquit the accused.

The second test to be applied, in determining whether a given picture is obscene, is whether the material is patently offensive because in its description or representation of sexual matters it violates, or goes substantially beyond what was permissible according to the current standards of the community as a whole.

For purposes of this second test only the community to be considered is defined as consisting of the seven counties which comprise the Central District of California. Those counties are San Luis Obispo, Ventura, Santa Barbara, San Bernardino, Riverside, Los Angeles and Orange.

In applying this test, each brochure, magazine or film considered as a whole, and not part by part, must be measured by those contemporary or current standards in effect at the time the brochures, magazines and film was mailed; and the standards of the entire community must be considered, in determining the limits of candor in the description or **[809]** representation of sex which are acceptable in the community.

Contemporary community standards are set by what is in fact by what is accepted in the community as a whole; that is to say, by society at large or people in

general; and not by what some persons or groups of persons may believe the community as a whole ought to accept or refuse to accept. It is a matter of common knowledge, of which the court takes judicial notice, that customs change, and that the community as a whole may from time to time find acceptable that which was formerly unacceptable, and not infrequently find presently acceptable that which some particular group of the population may regard as an unacceptable appeal to prurient interest.

The third test to be applied, in determining whether a given brochure, magazine or film is obscene is whether, taken as a whole, it is completely and utterly lacking in social value or importance. If the work has a minimum of artistic or other social value, then it is not obscene, even though it may appeal to prurient interest in sex in a manner substantially beyond the acceptable limits of candor established by the current standards of the community as a whole at the time the work was mailed.

Nudity in and of itself is not obscenity.

The fact that a film or magazine deals with such subjects as sex, prostitution, homosexuality, lesbianism, adultery, rape, incest, oral-genital contact, or some other **[810]** sexual deviation or aberration, does not mean that the film or magazine is, for that reason alone, obscene under the statute herein. You must determine legal obscenity in accordance with the law as I have given it to you.

A book or magazine is not obscene merely because it depicts a relationship which is contrary to the religious precepts of the community.

Having covered the three elements of obscenity, there is one additional matter that you may consider, and that is the matter of pandering. You must make the decision whether the materials are obscene under the test I have given you. In making this determination you are not

limited to the materials themselves. In addition, you may consider the setting in which they are presented. Examples of what you may consider in this regard are such things as: manner of distribution, circumstances of production, sale and advertising. The editorial intent is also relevant. What you are determining here is whether the materials were produced and sold as stock in trade of the business of pandering. Pandering is the business of purveying textual or graphic matter openly advertised to appeal to erotic interest of the customer.

The question of obscenity is to be answered by application of the basic test recited earlier, but if you find this to be a close case under that test, then you may consider the evidence of pandering to assist you in your **[811]** decision. Such evidence is pertinent to all three elements of the basic test of obscenity.

The circumstances of presentation and dissemination of material are especially relevant to a determination of whether the social importance claimed for the material is pretense or reality, or whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. Where the distributors' sole interest is on the sexually provocative aspects of the publications, that fact may be decisive in the determination of obscenity.

In summary, evidence of pandering simply is useful in applying the basic obscenity test where an exploitation of interest in titillation by pornography is shown with respect to the material lending itself to such exploitation through pervasive treatment or description of sexual matters. Such evidence may support the determination that the material is obscene, even though, in other context, the material would escape such condemnation.

You are here to determine the guilt or innocence of the accused from the evidence in the case. You are not

called upon to return a verdict as to the guilt or innocence of any other person or persons. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the accused, you should so find, even though you may believe one or more other persons are also guilty. But if any **[812]** reasonable doubt remains in your minds after impartial consideration of all the evidence in the case, it is your duty to find the accused not guilty.

A separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the accused guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for himself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times, you are not partisans. You are judges—judges of the facts. Your sole interest is to **[813]** seek the truth from the evidence in the case.

If any reference by the court or by counsel to matters of evidence does not coincide with your own recollection,

it is your recollection which should control during your deliberations.

The punishment provided by law for the offenses charged in the indictment is a matter exclusively within the province of the court, and should never be considered by the jury in any way, in arriving at an impartial verdict as to the guilt or innocence of the accused.

Upon retiring to the jury room, you will select one of your number to act as foreman or forewoman. The foreman will preside over your deliberations, and will be your spokesman here in court.

A form of verdict has been prepared for your convenience, and it states, after the caption of the case:

"We, the jury in the above entitled cause, find the defendant WILLIAM PINKUS . . ." and then there is a blank line for the insertion of the word "Guilty" or the words "Not guilty as charged in Count 1 of the indictment," another blank line for the insertion of the word "Guilty" or the words "Not guilty, as charged in Count 2 of the indictment." And so on down through Count 11. Each count to be decided separately.

You will take this form to the jury room, and when **[814]** you have reached unanimous agreement as to your verdict, you will have your foreman fill in, date and sign the form to state the verdict upon which you unanimously agree, and then return with your verdict in the courtroom.

It is proper to add the caution that nothing said in these instructions—nothing in any form of verdict prepared for your convenience, is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by a bailiff, signed by your foreman, or by one or more

members of the jury. No member of the jury should ever attempt to communicate with the court by any means other than a signed writing; and the court will never communicate with any member of the jury on any subject touching the merits of the case, other than in writing, or orally here in open court.

You will note from the oath about to be taken by the bailiffs that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person—not even to the court—how the jury stands, **[815]** numerically or otherwise, on the question of the guilt or innocence of the accused, until after you have reached an unanimous verdict.

• • • • •

[822] The Court: In the case of United States vs. Pinkus, let the record show that all the members of the jury are in their places and the defendant and counsel are before the court.

Mr. Sellers, you have been elected foreman of the jury, and I have your note indicating that the jury would like to have reread that instruction pertaining to pandering; is that correct?

The Foreman (Mr. Sellers): Yes, sir.

The Court: All right. I will reread that instruction **[823]** for you, reminding you that you are to consider the so-called three-prong test that I have indicated that would have its place in determining whether there was obscenity, and reminding you also of the admonition that the Government must prove the defendant's guilt beyond a reasonable doubt. And I will reread this instruction to you at your request.

Having covered the three elements of obscenity, there is one additional matter you may consider, and that is the matter of pandering. You must make the decision whether the materials are obscene under the test I have given you.

In making this determination you are not limited to the materials themselves.

In addition, you may consider the setting in which they were presented. Examples of what you may consider in this regard are such things as: manner of distribution, circumstances of production, sale, and advertising. The editorial intent is also relevant. What you are determining here is whether the materials were produced and sold as stock in trade of the business of pandering. Pandering is the business of purveying textual or graphic matter openly advertised to appeal to erotic interest of the customer.

The question of obscenity is to be answered by application of the basic test recited earlier, but if you find this to be a close case under that test, then you may [824] consider the evidence of pandering to assist you in your decision.

Such evidence is pertinent to all three elements of the basic test of obscenity.

The circumstances of presentation and dissemination of material are especially relevant to a determination of whether the social importance claimed for the material is pretense or reality, whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. Where the distributors' sole emphasis is on the sexually provocative aspects of the publications, that fact may be decisive in the determination of obscenity.

In summary, evidence of pandering simply is useful in applying the basic obscenity test where an exploitation of interest in titillation by pornography is shown with

respect to the material lending itself to such exploitation through pervasive treatment or description of sexual matters. Such evidence may support the determination that the material is obscene, even though, in other context, the material would escape such condemnation.

That constitutes a rereading of the instruction that you have asked and I will ask you now if you will please step down and follow the bailiff and return to your deliberation.

JUDGMENTS IN QUESTION

No. 76-1393

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

WILLIAM PINKUS, doing business as "ROSSLYN NEWS COMPANY" and "KAMERA",
Respondent-Appellant.

The Opinion of the Court of Appeals for the Ninth Circuit (April 7, 1977) appears in the Petition for Certiorari, p. 2a.

The Order of the Court of Appeals for the Ninth Circuit (June 6, 1977) appears in the Petition for Certiorari, p. 1a.

ORDER OF THE SUPREME COURT OF THE UNITED STATES GRANTING PETITION FOR A WRIT OF CERTIORARI

No. 77-39

SUPREME COURT OF THE UNITED STATES

WILLIAM PINKUS, d.b.a. "ROSSLYN NEWS COMPANY" and "KAMERA",
Petitioner,

v.

UNITED STATES,
Respondent.

ORDER ALLOWING CERTIORARI. Filed October 31, 1977.

The petition for a writ of certiorari is granted.

No. 77-39

In the Supreme Court of the United States

OCTOBER TERM, 1977

WILLIAM PINKUS d/b/a "ROSSLYN NEWS COMPANY" and "KAMERA," PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-19a) is reported at 551 F. 2d 1155.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1977. A petition for rehearing was denied on June 6, 1977 (Pet. App. 1a). The petition for a writ of certiorari was filed on July 6, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in an obscenity prosecution, the district court erred in instructing the jury that it should determine

the "average person" in the community by considering the "community as a whole," including the "sensitive and the insensitive" and the "young and old, * * * men, women and children * * *."

2. Whether, in the circumstances of this case, the district court erred in instructing the jury that, to be found obscene, material must appeal to the prurient interest of the "average person, or a member of a deviant sexual group * * *."

3. Whether the evidence justified the district court's jury instruction on pandering.

4. Whether the court of appeals abused its discretion under the concurrent sentence doctrine by refusing to review the district court's exclusion of comparison evidence that related to only one count, where petitioner had been sentenced to identical concurrent terms of imprisonment on all 11 counts.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted on 11 counts of mailing obscene material, in violation of 18 U.S.C. 1461.[1] Petitioner was sentenced to concurrent terms of four years' imprisonment and a

[1]This was petitioner's second conviction for the same offense. Petitioner's first trial was reversed by the court of appeals because the jury had been charged on the issue of obscenity under the *Miller* (*Miller* v. *California*, 413 U.S. 15) standard rather than under the *Roth-Memoirs* (*Roth* v. *United States*, 354 U.S. 476; *Memoirs* v. *Massachusetts*, 383 U.S. 413) standard, even though his alleged commission of the offense preceded this Court's decision in *Miller*. See *Marks* v. *United States*, 430 U.S. 188. At his second trial petitioner was convicted under the *Roth-Memoirs* standard.

$5,000 fine on each count. The court of appeals affirmed (Pet. App. 2a-19a).

1. The evidence showed that petitioner distributed 11 sexually explicit items through the mails, specifically, advertisements, brochures, a magazine and a motion picture film depicting scenes of sadobondage, oral sex, group sex, bestiality, use of artificial devices and masturbation. The parties stipulated that petitioner voluntarily mailed the materials with knowledge of their contents and with the intention that the materials be for the personal use of the recipients (Tr. 134-141).

Petitioner called four witnesses who testified concerning community standards and the prurient appeal and socially redeeming value of the materials. He also sought to introduce two films, "Deep Throat" and "The Devil in Miss Jones," as comparison evidence on the issue of contemporary community standards (Tr. 170). After viewing the films, the district court refused to admit them into evidence because the defense had not laid an adequate foundation for the films and because it would not have been proper for the jury to view them (Tr. 171, 693). However, the court did permit petitioner to introduce evidence showing the box office gross receipts of the two motion pictures (Tr. 294-297, 301).

On rebuttal, the government presented an expert in the fields of family counseling and human sexuality, who testified that the materials distributed by petitioner would appeal to the prurient interest of the average person as well as to members of specific deviant sexual groups (Tr. 573-578).

2. The district court charged the jury under the *Roth-Memoirs* obscenity standard, instructing it that to determine whether the dominant theme of the materials, taken as a whole, appealed to a prurient interest of the

"average person of the community," the jury should consider "the community as a whole," including the "sensitive and the insensitive" and the "young and old. * * * men, women and children * * *" (Tr. 807-808). The court also instructed the jury that it should consider how the materials would impress "the average person, or a member of a deviant sexual group" (*id.* at 807) and that pandering or the method of distribution could be taken into account in determining whether the materials were obscene (Tr. 810).

The court of appeals affirmed petitioner's conviction, finding that the district court's jury instructions, taken as a whole, were proper (Pet. App. 4a-11a).[2] The appellate court also viewed the two movie films that petitioner had sought to introduce at trial and concluded that they resembled only the film "No. 613," the mailing of which formed the basis for count 9 of the indictment, rather than any of the printed materials mailed by petitioner. Therefore, the court invoked the concurrent sentence doctrine to pretermit review of the comparison evidence issue, concluding that even if the trial judge's exclusion of the evidence had been erroneous, the error would relate only to one of the 11 counts on which petitioner was convicted (*id.* at 14a).

ARGUMENT

1. Petitioner contends that several portions of the district court's charge to the jury were erroneous. The

[2]Although the court of appeals stated that it disapproved of the mention of children in an obscenity charge if children were not involved in the case, it held that the reference here did not constitute reversible error because of other curative aspects of the instructions to the jury (Pet. App. 5a-6a).

court of appeals correctly rejected each of these claims in a thorough opinion on which we rely.

a. Petitioner's first two arguments concern the district court's definition of the "average person" in the community. The court instructed the jury (Tr. 807-808):

> Thus the brochures, magazines and films are not to be judged on the basis of your personal opinion. Nor are they to be judged by their effect on a particularly sensitive or insensitive person or group in the community. You are to judge these materials by the standard of the hypothetical average person in the community, but in determining this average standard you must include the sensitive and the insensitive, in other words, you must include everyone in the community.
>
> * * * As stated before, the test is how the average person of the community as a whole, that being the Central Judicial District of California, would have viewed the material at the time it was mailed.
>
> In determining community standards, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men, women and children, from all walks of life.
>
> If the predominant appeal of the pictures in question here, taken as a whole is an appeal to the normal interest in sex of the average person, the jury should acquit the accused.

Petitioner claims it was error to include references to children or "sensitive" persons in the court's elaboration upon the composition of the community. As this Court has frequently held, however, "jury instructions are to be judged as a whole, rather than by picking isolated phrases from them." *Hamling* v. *United States*, 418 U.S. 87, 107-108. See also *United States* v. *Park*, 421 U.S. 658,

674-675. When read in its entirety, the charge in this case gave no unfair emphasis to any segment of society, but rather set out for the jury's consideration the entire spectrum of society from which the "average person" should be determined.

For example, the trial court specifically advised the jury that the materials should not be judged by their effect on a particularly sensitive member of the community (Tr. 807). Likewise, the court merely stressed the obvious in remarking (*id.* at 808) that the community was comprised both of the "young and old, * * * men, women and children * * *," an instruction that cannot reasonably be construed to reduce the community standard to the level of a child or to give undue weight to the fact that children are part of the community. See *United States* v. *Manarite*, 448 F. 2d 583, 592 (C.A. 2), certiorari denied, 404 U.S. 947. Compare *Butler* v. *Michigan*, 352 U.S. 380, 383, where a Michigan statute that censored any book having a potentially deleterious effect on youth was held unconstitutional because it expressly reduced "the adult population of Michigan to reading only what is fit for children." The balanced instruction in the present case produced no such effect, since, as the court of appeals observed (Pet. App. 6a; emphasis in original), "[t]he *entire community* was explicitly made the appropriate standard for consideration."[3]

---

[3]Petitioner also relies (Pet. 16) on a footnote in *Ginzburg* v. *United States*, 383 U.S. 463, 465, n. 3, in which this Court explained that it was not "to be understood as approving all aspects of the trial judge's exegesis of *Roth*." The district court in *Ginzburg* had stated that the community as a whole contained "children of all ages, psychotics, feeble-minded and other susceptible elements. Just as they cannot set the pace for the adult reader's taste, they cannot be overlooked as part of the community." *Ibid.* This comment lacked the neutrality of the charge in the present case because it emphasized only the young and sensitive elements of the community. Here, by contrast, the instruction gave equal emphasis to the less susceptible segments of society, while reminding the jury that the feelings of neither group were conclusive.

b. Petitioner also alleges error in the following portion of the charge (Tr. 806-807):

> In applying this test [for prurient interest], the question involved is not how the picture now impresses the individual juror, but rather, considering the intended and probable recipients, how the picture would have impressed the average person, or a member of a deviant sexual group at the time they received the picture.

Petitioner contends (Pet. 30-33) that this instruction was improper because there was no evidence that the materials appealed to the prurient interest of a defined deviant group. But, to the contrary, there was testimony of an expert witness that the materials appealed to the prurient interests of "homosexuals, sado-masochists and those interested in group sex" (Pet. App. 19a, n. 7). Furthermore, as this Court noted in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56 and n. 6, obscene materials speak for themselves, and there is therefore no need to introduce other evidence to prove that certain exhibits appeal to either the average person or deviant groups.[4]

In any event, *Hamling* v. *United States, supra*, 418 U.S. at 128, specifically held that, even in the absence of testimony expressly suggesting that certain obscene materials had been designed for and primarily disseminated to a specific deviant group, the jury "could consider whether some portions of those materials appealed to a prurient interest of a specifically defined deviant group as well as whether they appealed to the prurient

---

[4]In *Slaton* the Court reserved decision only on whether expert testimony may be needed in the case of a "*bizarre* deviant group." 413 U.S. at 56, n. 6 (emphasis added).

interest of the average person." In approving this instruction, the Court noted that it was " 'manifest that the District Court considered that some of the portrayals in the Brochure might be found to have a prurient appeal' to a deviant group" (*ibid.*, quoting *United States* v. *Hamling*, 481 F. 2d 307, 321 (C.A. 9)). Finally, petitioner's contention that this instruction is inconsistent with *Mishkin* v. *New York*, 383 U.S. 502, was also expressly rejected in *Hamling* (418 U.S. at 128-129).

c. Petitioner claims (Pet. 34-39) that the government did not offer sufficient evidence of his method of distribution to warrant the following charge on pandering (Tr. 810):[5]

> Having covered the three elements of obscenity, there is one additional matter that you may consider, and that is the matter of pandering. You must make the decision whether the materials are obscene under the test I have given you. In making this determination you are not limited to the materials themselves. In addition, you may consider the setting in which they are presented. Examples of what you may consider in this regard are such things as: manner of distribution, circumstances of production, sale and advertising. The editorial intent is also relevant. What you are determining here is whether the materials were produced and sold as stock in trade of the business of pandering. Pandering is the business of purveying textual or graphic matter openly advertised to appeal to erotic interest of the customer.

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[5]A pandering charge quite similar to the one given in this case was recently approved by this Court in *Splawn* v. *California*, No. 76-143, decided June 6, 1977. See also *Hamling* v. *United States*, *supra*, 418 U.S. at 130; *Ginzburg* v. *United States*, *supra*, 383 U.S. at 470.

Contrary to petitioner's assertions, this instruction was fully justified by the evidence. The proof at trial included the name, occupation and location of each recipient of the obscene materials, in addition to the stipulation that petitioner intentionally distributed the materials through the mails over a period of 11 months, with knowledge of their contents. The recipients were residents of different states and included a student, a housewife, a minister and a police lieutenant (Tr. 134-141), several of whom desired not to be sent the mailings (see, *e.g.*, G.X. 6). Furthermore, petitioner's advertisements themselves emphasized the sexually explicit nature of the materials and "stimulated the reader to accept them as prurient." *Ginzburg* v. *United States*, *supra*, 383 U.S. at 470. See, *e.g.*, G.X. 2A, 7A. In these circumstances the jury could appropriately consider the evidence of pandering in determining whether the materials were obscene. See *Splawn* v. *California*, No. 76-143, decided June 6, 1977, slip op. 2.

2. Petitioner was convicted on 11 counts of mailing obscene materials, only one of which (count 9) concerned the distribution of a motion picture film, "No. 613." Petitioner contends (Pet. 21-29) that the district court erroneously excluded comparison evidence—the films "Deep Throat" and "The Devil in Miss Jones"—that he sought to introduce in order to show that "No. 613" was not obscene when judged by contemporary community standards and that the court of appeals misapplied the concurrent sentence doctrine in declining to review the lower court's decision. This claim is insubstantial.

Petitioner does not seriously dispute the court of appeals' finding that the comparison evidence rejected by the trial judge related only to the film "No. 613" and bore no resemblance to the obscene materials charged in the other 10 counts of the indictment. Thus, since the

validity of petitioner's conviction on those 10 counts (for which he received sentences concurrent with his sentence on count 9) would not have been disturbed even if the court of appeals held that the comparison evidence had been improperly excluded, this case was a proper occasion for application of the concurrent sentence doctrine, which is a recognized judicial instrument to avoid deciding issues not necessary to the outcome of a case. See *Andresen* v. *Maryland*, 427 U.S. 463, 469, n. 4; *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16.[6]

Although some courts have suggested that the concurrent sentence doctrine should not be invoked where to do so may affect future sentencing under a habitual offender statute or parole eligibility or may be used to impeach testimony at a subsequent trial (see *United States* v. *Tanner*, 471 F. 2d 128 (C.A. 7), certiorari denied, 409 U.S. 949), petitioner has presented none of these considerations here. Rather, he contends only that he may have been prejudiced at trial because the jury may have been less likely to convict him on the other 10 counts if it had acquitted him on the count involving the film "No. 613." This argument, however, is based on wholly unsupported speculation, and its adoption would virtually eliminate the concurrent sentence doctrine.[7]

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[6]Furthermore, the relevance of these two films was questionable, since even "[a] judicial determination that particular matters are not obscene does not necessarily make them relevant to the determination of the obscenity of other materials, much less mandate their admission into evidence." *Hamling* v. *United States*, *supra*, 418 U.S. at 126-127.

[7]We have previously discussed petitioner's allegation of a conflict among the circuits as to the applicability of the concurrent sentence doctrine in our brief in opposition in *Darnell* v. *United States*, No. 76-5804, certiorari denied, 429 U.S. 1104, a copy of which we are serving on petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1977.

Supreme Court of the United States

October Term, 1977

No. 77-39

WILLIAM PINKUS, doing business as "ROSSLYN NEWS COMPANY" and "KAMERA",

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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WILLIAM PINKUS, doing business as "ROSSLYN NEWS COMPANY" and "KAMERA",
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *United States v. Pinkus*, 551 F.2d 1155 (9th Cir. 1977), and is set forth in the Appendix to the Petition for Certiorari, p. 2a.

No opinion was delivered by the District Court.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals (Pet. App. 2a) was entered on April 7, 1977. A petition for rehearing with a suggestion for rehearing *en banc* was denied on June 6, 1977 (Pet. App. 1a).

The petition for a writ of certiorari was filed on July 6, 1977, and was granted on October 31, 1977 (App. 66).

The jurisdiction of this Court rests on 28 U.S.C., Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment I:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The relevant statutory provision is Title 18, U.S.C., Section 1461 and is set out in the Appendix to this brief, *infra*, p. 55.

THE QUESTIONS PRESENTED FOR REVIEW

I.

In a federal prosecution for mailing allegedly obscene materials, where it was stipulated that the materials were not mailed to children and that children were not involved in the case, did the District Court's jury instruction that children were to be considered as part of the community whose standards were to be applied in determining whether the materials were obscene contravene the First Amendment and constitute reversible error?

II.

In a federal prosecution for mailing allegedly obscene materials, where there was no evidence that the materials were mailed to especially sensitive persons, did the District Court's jury instruction that sensitive persons were included in the community whose standards were to be applied in determining whether the materials were obscene contravene the First Amendment and constitute reversible error?

III.

In a federal prosecution for mailing allegedly obscene materials, where the Court of Appeals, in reviewing petitioner's conviction, determined that two motion pictures offered as comparison evidence and excluded by the District Court bore a reasonable resemblance to the motion picture film which was the subject of one of several counts of the indictment, and where the record demonstrated massive public acceptance of the two films, (i) did the Court of Appeals err in refusing to review the exclusion of the comparison evidence in reliance upon the concurrent sentence doctrine; and (ii) where the defense adduced uncontradicted evidence that two motion pictures had received massive public acceptance within the community, and offered proof that these two films were comparable to the allegedly obscene materials, did the refusal of the District Court to permit the jury to review the films constitute reversible error?

IV.

In a federal prosecution for mailing allegedly obscene materials, where the record contained no evidence that the material was designed for or disseminated to any clearly defined deviant group, (i) did the District Court err in instructing the jury that it could consider the appeal of the material to the prurient interest of members of a deviant sexual group, and (ii) did the District Court err in instructing the jury that it could consider the appeal of such material to members of a deviant group without

finding that the material was "designed for and primarily disseminated to a clearly defined deviant sexual group?"

V.

In a federal prosecution for mailing allegedly obscene materials, where there was no evidence as to the setting in which the materials were presented, or their manner of distribution, circumstances of production, sale or advertising, except the allegedly obscene advertisements and brochures themselves and the occupations of the recipients, did the Court below err (i) in instructing the jury that it could consider pandering in determining whether the materials were obscene, and (ii) in specifically instructing the jury that it could consider the setting in which the materials were presented including their manner of distribution, circumstances of production, sale or advertising?

STATEMENT OF THE CASE

On November 6, 1972, petitioner William Pinkus was indicted in the United States District Court for the Central District of California on eleven counts of mailing obscene material and advertisements in violation of 18 U.S.C. §1461.[1]

---

1. App. 1a. The record in the Court of Appeals below consisted of transcripts of the clerk's record and the reporter's record. References to the transcript of the clerk's record are herein designated by the prefix "C.T.", and references to the reporter's transcript are designated by the prefix "R.T."

Counts I, IV, V, VI, VII, IX, X and XI charged petitioner with mailing obscene brochures advertising films, books and magazines (and, in case of Count X, playing cards). Counts II, III and VIII charged him with mailing information where obscene material could be obtained. In addition, Count VII alleged the mailing of an obscene magazine and Count IX alleged the mailing of an obscene film. The dates of the alleged offenses ranged from July 28, 1971, to June 19, 1972.

A jury trial held in July of 1973 resulted in petitioner's conviction which was reversed by the Court of Appeals for the Ninth Circuit on or about February 5, 1975.[2] The reversal of the prior conviction under this indictment was based upon the fact that the jury had been instructed under the expanded concept of obscenity announced in *Miller v. California,* 413 U.S. 15 (1973), although the alleged offenses occurred prior to that decision so that the more stringent *Roth-Memoirs* definition of obscenity was applicable. *Cf. Marks v. United States,* ..... U.S. ....., 97 S. Ct. 990 (1977).

Petitioner was retried before the same trial judge, generally in January of 1976, under *Roth-Memoirs* precepts, a jury verdict of guilty on all eleven counts was returned on January 12, 1976. On February 9, 1976, the Court sentenced William Pinkus to imprisonment for four years on each count, sentences to run concurrently (App. 8). The Court also initially fined him an aggregate total of $11,000 (*ibid.*), but upon noting that this fine was greater than that imposed following the first trial, the Court reduced the fine to $5,500 by entry dated March 1, 1976 (App. 10).

Appellant perfected an appeal from the District Court's judgment and sentence to the Court of Appeals for the Ninth Circuit, which affirmed the judgment.

FACTS

The Government's Case-in-Chief

The Government's case-in-chief consisted solely of the introduction of the allegedly obscene brochures and adver-

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2. *United States v. Pinkus,* No. 73-2900 (9th Cir. 1975).

tised or mailed materials (Government's Exhs. 1-11; R.T. 146) and the reading of a stipulation that the materials were voluntarily and intentionally mailed by the petitioner with knowledge of the content and with the intention that the mailed materials be for the personal use of the recipient (App. 13-18).

At the close of the government's case, the government acknowledged that certain materials were presented as appealing to deviant groups (App. 19). The defense called the attention of the Court to the lack of any independent evidence as to the deviant character of the materials (*Ibid.*), and moved for acquittal (R.T. 155-156; C.T. 177-180). The motion was overruled (R.T. 164).

The Defense Case

The defense case consisted of expert and survey evidence tending to prove that the materials did not appeal to prurient interest, did not exceed community standards and had redeeming value. A survey of sexual attitudes was, in part, admitted (R.T. 218-258; 304-432; 469-513; Deft. Exhs. G, H & I; R.T. 439, 440, 442, 535).

In support of the community acceptance of comparable materials, the defense called Whitney Williams, a representative of the entertainment newspaper, *Daily Variety*, who presented box office statistics for the popular films "Deep Throat" and "The Devil in Miss Jones" in the Los Angeles area (App. 21-26), indicating that at $5.00 per admission, "Deep Throat" grossed $2,672,476 during 1973 (App. 25-26; Deft. Exh. D; R.T. 295, 304) and additional large sums in 1974 (App. 25), that "The Devil in Miss Jones" grossed $1,209,180 during 37 weeks in 1973-1974 (App. 27; Deft. Exh. E; R.T. 297, 304), and that these sexually explicit films were rated first and third on the list of the ten highest grossing films of the year in Los

Angeles (App. 27). At the $5.00 admission price, more than one-half million people attended exhibitions of "Deep Throat" in Los Angeles during 1973 alone, while more than 240,000 people purchased tickets for "The Devil in Miss Jones".

Although the trial judge had permitted the jury to hear these statistics concerning the public acceptance of "Deep Throat" and "The Devil in Miss Jones", he refused to allow the jury to see these motion pictures. Repeatedly during the trial, the defense offered to exhibit these two films to the jury either in a theater (App. 31) or in the courtroom (App. 31), both for the benefit of the court and the jury on the issue of obscenity *vel non* and as comparison materials on the issue of contemporary community standards (R.T. 691).[3] The trial judge refused to permit these films to be admitted (R.T. 539, App. 30; 41-42) because he had viewed "part" of "Deep Throat" and felt "that it would not be proper for the films that have been offered to be shown to the jury." The basis of this conclusion is not explained further in the record.

The trial judge acknowledged that:

> ". . . in no way does [this case] involve any distribution of material of any kind to children, and that the evidence will, that there will be a stipulation even that there has been no exposure of any of this evidence to children." (App. 12).

Nevertheless, the trial judge permitted cross-examination of a defense witness on the effects of obscenity on children (R.T. 396-97).

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3. Defense Exhibits K, L, M, N and O (R.T. 538-539; App. 30).

Government Rebuttal

After the defense rested, over objections the Government called a rebuttal witness, Dr. James Rue. Dr. Rue was a family counsellor with minimal qualifications in sexual matters, whose doctorate was in telecommunications (R.T. 557-558; 569-570). Over objection, Dr. Rue mentioned contact with "deviant sexual groupings" in his practice (R.T. 552) and was allowed to testify that certain aspects of the materials had appeal to "the average person in the community as well as sexually deviant groups" (App. 40-41).

This witness never did testify as to the effect of specific material on particular well-defined deviant groups, and there is utterly no evidence in the record that the material was designed for or distributed to the members of any deviant group. Dr. Rue's testimony on the subject of deviance was merely that the diverse materials as a whole appealed to the prurient interest of the average person (App. 41) and, also, the prurient interest of a member of an unspecified sexually deviant group (App. 41).

Over objection, the Court also permitted Dr. Rue to testify as to the adverse effect of obscene materials on the "young person" (App. 38).

In direct examination, Dr. Rue was asked whether he had any experience which would illustrate the effect on the viewer of viewing similar material. He replied that in a case "he was currently dealing with, the father had molested his own daughter after having come from an adult book store. . . ." (App. 38). Petitioner immediately moved to strike and moved for a mistrial, but the motions were denied (App. 38).

The Jury Charge

Notwithstanding the stipulation that children were not involved in this case, the trial court refused to instruct the jury that the defendant was not charged "with having violated any law with regard to minor children" or that the jury should not "assume from the fact that there might have been testimony concerning minor children that the defendant is in any way associated with any issue concerning children." (C.T. 191; R.T. 661-662). The judge refused all instructions tendered by petitioner which would have defined community standards in terms of what is accepted by the "average adult person" (C.T. 215; R.T. 672; R.T. 678).

Instead of excluding consideration of the special sensibilities of minors, the trial judge expressly adopted an instruction requested by the Government (C.T. 243) and charged the jury that:

> "In determining community standards, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men women and *children*, from all walks of life." (App. 58) (Emphasis added).

The District Court also charged the jury that in determining the hypothetical average standard in the community, the jury must include the "sensitive", as well as the "insensitive"; that "in other words, you must include everyone in the community." (App. 57).

Despite the lack of sufficient testimony concerning the existence of any well-defined deviant group or groups for whom the material was designed or to whom it was distributed, the Court instructed the jury (over objection), that it must gauge whether the material when "considered

in relation to the intended and probable recipients constituted an appeal to the prurient interest of the average person . . . or the prurient interest of members of a deviant sexual group" (App. 57) and that in applying the prurient interest test it must consider "how the picture would have impressed the average person, or a member of a deviant sexual group. . . ." (App. 57).

The Court also instructed the jury at length, over objection, on pandering (App. 59-60). The charge, in part, instructed the jury that in determining the obscenity of the materials, it could "consider the setting in which they are presented." (App. 60).

> "Examples of what you may consider in this regard are such things as: manner of distribution, circumstances of production, sale and advertising." (*Ibid.*).

Except for the brochures themselves, there was not a scintilla of evidence on any of these subjects.

SUMMARY OF ARGUMENT

1. In this federal prosecution in which the petitioner was charged with eleven counts of violating Title 18 U.S.C. Section 1461, the trial court erred in its charge to the jury by instructing it that in determining whether the materials in issue were obscene it was to include children in its composition of the community whose standards were to be applied, contrary to the teachings of this Court's decision in *Roth v. The United States,* 354 U.S. 476 (1957), which decision expressly rejected the concept of obscenity first announced in *Regina v. Hicklin* [1868], L.R. 3 Q.B. 360. Petitioner's requested charge that would have instructed the jury to exclude children from its consideration of the composition of the community was refused. By instructing the jury to view the material based on a community standard which necessarily included the effect of the material in issue upon "children" rather than the "average person" or "reasonable person," the trial court subverted the formula for determining obscenity established by this Court. *Hamling v. United States,* 418 U.S. 87 (1974).

Moreover, the trial court also instructed the jury to include "everyone" in the community, including "insensitive" and "sensitive" persons in determining the average person in the community. This portion of the trial court's instruction to the jury was likewise erroneous and contrary to this Court's decisions in *Roth* and *Miller,* which require that the jury be instructed to *ignore* and *exclude* the sensibilities of the most susceptible members of the community. The deficiencies in the objectionable portions of the charge were not cured by any other instructions contained in the charge.

2. Petitioner offered to introduce two films for comparison purposes, whose wide community acceptance was clearly established and whose similarity to the materials in issue was conceded by the court below. The evidence was refused by the trial court. The court below declined to review petitioner's assignment of error on the refused admission of the films as it applied to a single count involving film by applying the concurrent sentence doctrine of *Benton v. Maryland,* 395 U.S. 784 (1969), in which the doctrine was held not to be a jurisdictional bar to review. The court below erred in applying the concurrent sentence doctrine in the circumstances of this case for the reason that there were adverse collateral consequences flowing from the trial court's refusal to admit the offered films.

The trial court's refusal to admit the films should have been accorded appellate review independent of the concurrent sentence doctrine for the reason that the explicit sexual activity depicted in the offered films was identical to the sexual activity depicted in the still photographs contained in the materials introduced in evidence to support the prosecution's charges as to the other ten remaining counts of the indictment. The prosecution did not sustain its burden to prove beyond a reasonable doubt that the refusal of the trial court to admit the films as to all counts was not prejudicial to petitioner. *Fahy v. Connecticut*, 375 U.S. 85 (1963), and *Chapman v. California*, 386 U.S. 18 (1967).

The trial court erred in refusing admission of the offered films as comparables where the similarity of the material offered as comparables to the material charged was clear and so found by the court below, community acceptance of the offered films was proved without dispute, and the foundation for the admission of the material was properly laid. In such circumstance, the jury was forced to speculate as to the content of the films whose widespread acceptance had been attested to by a defense witness.

3. There was not sufficient evidence in the record to warrant the trial court's charge to the jury on prurient appeal of the material in issue to members of a deviant sexual group. *Mishkin v. New York*, 383 U.S. 501 (1966), and *Hamling v. United States*, 418 U.S. 87 (1974). In the absence of evidence showing that the material was designed for and disseminated to a particularly defined deviant group, the instruction on appeal to deviant groups should not have been given. The prosecution should be required to introduce evidence for the jury's use in determining whether certain materials appeal to the prurient

interest of members of a deviant group. *United States v. Klaw*, 350 F.2d 155 (1965), and see *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 56, fn. 6 (1973).

The trial court's charge on the materials' appeal to members of deviant groups also should have instructed the jury to find whether the materials had been designed for and primarily disseminated to a clearly defined deviant sexual group prior to determining whether such materials in fact appealed to the prurient interest of the members of such group.

4. The trial court erred in instructing the jury that it could consider pandering as an adjunct to the test to be applied in determining whether the materials in issue were obscene, where the only evidence offered by the prosecution to prove the charges against petitioner consisted of the materials themselves and a stipulation that the materials had been mailed to certain identified adult individuals whose occupations were stated. *Ginzburg v. United States*, 383 U.S. 463 (1966). The record contains no evidence showing petitioner's methods of operation, the scope or manner of distribution of the materials or the economic factors attendant to the marketing of the materials. *Ginzburg v. United States, supra; Mishkin v. New York, supra*; and *Hamling v. United States, supra*. The trial court's charge on pandering enabled the prosecutor to disproportionately augment any evidence which may have appeared in the record with respect to pandering. Inasmuch as the jury itself requested that the charge on pandering be reread to it, the prejudicial effect of this portion of the charge is clear. The prosecution's burden of proving lack of prejudice as required by *Fahy v. Connecticut, supra*, and *Chapman v. California, supra*, has not been met.

The pandering charge was also erroneous in that the trial court instructed the jury that it could consider the "setting" in which the materials were presented, including "manner of distribution, circumstances of production, sale and advertising". No evidence of the setting, manner of distribution or the other factors which the court instructed the jury to consider appear in the record. The jury was therefore instructed to consider matters not in evidence and thereby was permitted to make unwarranted assumptions of facts in reaching its verdict. *United States v. Breitling*, 20 How. 252, 61 U.S. 252 (1858).

ARGUMENT

I. THE COMPOSITION OF THE COMMUNITY WHOSE STANDARD IS TO BE APPLIED BY A JURY IN ITS DETERMINATION OF WHETHER THE MATERIALS IN ISSUE ARE OBSCENE SHOULD NOT INCLUDE CHILDREN AND SENSITIVE PERSONS.

A. Children Should Not Be Included in the Community.

The jury was instructed to determine whether the materials in issue were obscene by application of the definition of obscenity established in *Roth v. United States*, 354 U.S. 476 (1957) and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). The trial court instructed the jury that its determination was to be made on the basis of "how the average person of the community as a whole . . . would have viewed the material at the time it was mailed." (App. 58). The Court then instructed members of the jury as to what interests were to be considered by them in establishing the community standard to be applied:

> "In determining community standards, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men, women and children, from all walks of life." (App. 58).

Petitioner had specifically requested the trial court to charge the jury that children were to be excluded from its consideration in its determination of the composition of the community (C.T. 191). The inclusion of children as a segment of the community whose interests were to be weighed in reaching a standard was insisted upon by both respondent and the trial court over repeated objection by petitioner (R.T. 641-42). The jury's authorization to include children in its standard was granted notwithstanding the fact that the trial court itself, in response to an inquiry from a juror at the outset of the trial, had advised the jury that it was stipulated that children had not been exposed to the materials which were to be judged by the jury (App. 12).

The inclusion of children by the trial court in its charge to the jury was assigned as error to the court below. Although that court did not approve, but rather disapproved, the challenged instruction, it failed to conclude that the instruction constituted error because it could find no authoritative precedent to sustain the claimed error:

> ". . . [W]e find no reversible error here, not because of the outcome in *Manarite*, but because of lack of authority against such an outcome. We do not imply that we approve this language. Rather, we feel that the specific inclusion of children is unnecessary in the definition of the community and prefer that chil-

dren be excluded from the court's instruction until the Supreme Court clearly indicates that inclusion is proper." *United States v. Pinkus*, 551 F.2d 1155, 1158.

The precise question as to whether a jury should be instructed to exclude children from the composite community in the determination of the standard to be applied in viewing allegedly obscene materials may well not have been previously addressed directly by this Court. However, consideration of the fundamental determinations made by this Court in the obscenity cases which it has decided in the past thirty years makes clear that children should not be included in the "community" if the First Amendment, against which all obscenity legislation and obscenity prosecutions are tested, is to retain its vitality.

The ancient test of obscenity was formulated in *Regina v. Hicklin* [1868], L.R. 3 Q.B. 360, in which Chief Justice Cockburn established the criteria which thereafter prevailed for almost a century:

> "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. Now, with regard to this work, it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of advanced years, thoughts of a most impure and libidinous character." *Id.*, at 371.

The thrust of the English jurist's test of obscenity was emphasized by his stated concern that particularly susceptible persons would read the condemned book:

> "This book we are told, is circulated at the corners of streets and in all directions, and of course it falls into the hands of persons of all classes—young and old—and the minds of the hitherto pure are exposed to the danger of contamination and pollution from the impurity it contains." *Ibid.*

The concept of obscenity first announced in *Regina v. Hicklin* was absolutely repudiated in *Roth v. United States*, 354 U.S. 476 (1957), in which the Court stated:

> "The Hicklin test, *judging obscenity by the effect* of isolated passages *upon the most susceptible persons*, might well encompass material legitimately treating with sex, and so it *must be rejected as unconstitutionally restrictive of freedoms of speech and press*. *Id.*, 354 U.S. at 489. (Emphasis supplied).

Although *Roth* specifically rejected the notion that particularly vulnerable members of a community could set its obscenity standards, it has been suggested that because the charge of the trial court in *Roth* included children as part of the community whose standard was to apply, that case authorizes such a jury instruction. See *United States v. Manarite*, 448 F.2d 583, 592 (2nd Cir. 1971), *cert. denied*, 404 U.S. 947 (1971), and the opinion of the court below in the case at bar. 551 F.2d at 1158. A careful reading of *Roth* and its progeny leads ineluctably to the opposite conclusion. In *Roth*, the charge was not under review, nor was that issue raised or considered in the majority opinion. Chief Justice Warren, concurring in *Roth*, rejected the implication that children were included in the community whose standards defined obscenity; he specifically noted that whether particular material is obscene varies with "the part of the community

it reache[s]," *Id.*, 354 U.S. at 495,[4] and therefore urged that the decision itself be limited to the validity of the statutes in issue as applied to the facts in the case. Justice Harlan, concurring and dissenting in *Roth*, observed that the "correctness of the charge is not before us," the same having been subsumed in the question of the statute's validity, 354 U.S. at 507, fn. 8, and interpreted the majority to have excluded children from the "community". He stated:

> "I agree with the Court, of course, that the books must be judged as a whole and in relation to the normal adult reader." *Id.*, at 502.

In his concurrence in the decision of the Court of Appeals for the Second Circuit in *Roth*, Judge Frank approved the trial court's charge because in another part of the charge the trial court expressly instructed the jury not to consider the effect of the material on children. *United States v. Roth*, 237 F.2d 796, 801, fn. 1 (1957) (Frank, J., concurring), *aff'd*, 354 U.S. 476 (1957). No such additional language appears in the charge in this case. Judge Frank concluded that the correct test to be applied is the effect of the material on the "average, normal, adult persons. . . ." *Id.*, 237 F.2d at 801.

In addition, the statement of this Court in *Ginzburg v. United States*, 383 U.S. 463 (1966), dispels any notion that the Court's affirmance of the conviction in *Roth* constituted an approval of the trial court's jury charge:

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4. Consistent with the "variable" concept of obscenity he expressed in *Roth*, Chief Justice Warren, dissenting in *Jacobellis v. Ohio*, 378 U.S. 185, 201 (1964), stated:

> "A technical or legal treatise on pornography may well be inoffensive under most circumstances but, at the same time, 'obscene' in the extreme when sold or displayed to children." (Footnote omitted).

> *"We are not, however, to be understood as approving all aspects of the trial judge's exegesis of Roth, for example, his remarks that 'the community as a whole is the proper consideration.* In this community, our society, we have children of all ages, psychotics, feeble-minded and other susceptible elements. Just as they cannot set the pace for the average adult reader's taste, they cannot be overlooked as part of that community.' 224 F. Supp. at 137. Compare *Butler v. State of Michigan*, 352 U.S. 380, 77 S. Ct. 524, 1 L.Ed. 2d 412." *Id.*, 383 U.S. at 465, fn. 3. (Emphasis supplied).

Several months prior to the announcement of this Court's decision in *Roth*, the Court had occasion to review a Michigan statute which prohibited distribution to the general public of material which was found to have a deleterious influence on children. In striking down the statute, this Court held that:

> "We have before us legislation not reasonably restricted to the evil with which it is said to deal. *The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children.* It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society." *Butler v. Michigan*, 352 U.S. 380, 383-384 (1957). (Emphasis supplied).

The court below attempted to distinguish the case at bar from *Butler* by noting that the statute effectively reduced the reading material available to adult residents of Michigan to the level of children, whereas the trial court's charge here merely required inclusion of the in-

terests of children as a part of the community whose standard was to be applied when viewing the materials. This is a distinction without a constitutional difference, for the vice inherent in any regulatory scheme which includes children as a part of the standard to be applied in determining whether materials are obscene is that adult rights to read or view materials at the outer limits of First Amendment protections are necessarily diluted by *any* consideration of the special susceptibility of children, particularly in a case such as this one, where the materials in issue were distributed only to adults.

The inclusion of children in the charge constitutes a regression, a century step backward to the rule announced in *Hicklin*[5] and denounced in *Roth*. We no longer look to the effect upon the most susceptible persons in the community to determine whether material is obscene. The thrust of *Roth* was to *exclude* most susceptible persons from controlling such a determination.

Moreover, the constitutional infirmity of the charge is compounded by the court's instruction to the jury that it must include not only children, but also other "sensitive persons" in the community whose standards effect the definition of obscenity. The trial court's instructions in this case necessarily prevent a jury determination of the "average person" or "reasonable person" whose standard this Court stated in *Hamling v. United States*, 418 U.S. 87, 104 (1974) and reaffirmed in *Smith v. United States*, ... U.S. ....., 45 U.S.L.W. 4495, 4498 (1977), was constitutionally appropriate for determining whether material is obscene.

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5. *Hicklin* itself appears to have been overruled in England, its source, as well as in the United States. See *Regina v. Martin Seeker Warburg, Ltd.* [1954], All Eng. 683, in which Justice Stable charged the jury that obscenity is not to be judged by the materials' effect on children or adolescents.

Petitioner therefore respectfully urges the Court to find that the trial court's instruction to the jury that it include children as a part of the community in determining the standard to be applied in reaching its verdict, together with its refusal to grant petitioner's requests to charge on the same subject, constituted reversible error.

B. "Sensitive Persons" Should Not Be Included in the Community.

In addition to including "children" as members of the relevant community whose standards were to be applied in assessing the obscenity of the materials (see discussion at pp. 14-21, *supra*), the district court charged the jury that:

> "Thus the brochures, magazines and film are not to be judged on the basis of your personal opinion. Nor are they to be judged by their effect on a particularly sensitive or insensitive person or group in the community. You are to judge these materials by the standard of the hypothetical average person in the community, but in determining this average standard *you must include the sensitive* and the insensitive, in other words, *you must include everyone* in the community." App. 57. (Emphasis supplied).

The court below approved the portion of the court's charge here urged as error upon a finding that the direction as to inclusion of "sensitive" and "insensitive" persons in the community "was merely an elaboration on the concept of the total community." 551 F.2d at 1157-1158. However, the determination of the court below that the total community concept allows an instruction which mandates the inclusion of sensitive persons in the community is at odds with the fundamental precepts for determination of obscenity established in *Roth*, and as specifically pro-

claimed by this Court in *Miller v. California*, 413 U.S. 15 (1973), that:

> ". . . the primary concern with requiring a jury to apply the standard of 'the average person, applying contemporary community standards' is to be certain that, so far as material is not aimed at a deviant group, *it will be judged by its impact on an average person, rather than a particularly* susceptible or *sensitive person*—or indeed a totally insensitive one." *Id.*, 413 U.S. at 33. (Emphasis added).

It is readily apparent that the purport of this language quoted from *Miller* is to *exclude* from the jury's consideration the sensibilities of the most and least sensitive persons. However, the thrust of the amplification of the "average man" concept contained in the trial judge's charge here is to require the jury to *include* the sensibilities of *"everyone"* in the community in its deliberations before calculating the average level of sensitivity. Although jurors may have some common-sense notion of what an "average" attitude in the community might be, they do not know "everyone in the community," and cannot be expected intelligently to apply an equation which requires them to arrive at the median by reference to "everyone". The practical effect of this instruction is to require the jury to consider and include that which *Miller* and *Roth* both required them to ignore and exclude—the sensibilities of the most susceptible members of the community. As this Court recently said:

> ". . . a principal concern in requiring that a judgment be made on the basis of 'contemporary community standards' is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." *Hamling v. United States*, 418 U.S. 87, 107 (1974).

By undermining that concern, the jury charge in this case was prejudically erroneous.

The court below also sustained the challenged instruction by giving consideration to the entire charge rather than isolated passages, citing *Boyd v. United States*, 271 U.S. 104, 107 (1926), in which this principle of review was formulated; *United States v. Hamling, supra*, and *United States v. Moore*, 522 F.2d 1068, 1079 (9th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976). In *Hamling*, however, the Court made clear that the objection to the trial court's instruction that a national standard be applied did not "materially affect the deliberations of the jury", *Id.*, 418 U.S. at 108, because the substantive law on the application of community standards as opposed to the jurors' individual standards had been correctly given to the jury. *Id.*, 418 U.S. at 107.

In *United States v. Moore, supra*, a proffered jury instruction was refused by the trial court. The Court of Appeals found that the substance of the requested instruction was communicated to the jury in the balance of the charge. The deficiencies in the trial court's charge here, unlike *Moore*, are neither consistent with the substantive law which the court should have charged, nor are they in the nature of omissions, the substance of which could be said to appear elsewhere. Rather, the deficiencies in the charge here complained of improperly and affirmatively misinstructed the jury on the law it was to apply. Upon consideration of the practical effect of the Court's instruction upon the jury, its mischief is apparent. Any conscientious juror instructed to give *some* weight to the effect of the material in issue upon children and other sensitive persons in the community, is likely to give *greater*

weight than the First Amendment permits to protecting the community's more susceptible citizens from offensive literature. Thus does the First Amendment erode.

The critical importance of proper jury instructions in obscenity prosecutions was recently noted by this Court in *Smith v. United States*, ... U.S. ....., 45 U.S.L.W. 4495 (1977). Justice Blackmun there stated:

> ". . . obscenity is to be judged according to the average person in the community, rather than the most prudish or the most tolerant. *Hamling v. United States, supra*; *Miller v. California, supra*; *Roth v. United States*, 354 U.S. 476 (1957). *Both of these substantive limitations are passed on to the jury in the form of instructions.*" *Id.*, ... U.S. at ..... 45 U.S.L.W. at 4498. (Emphasis added).

The trial court's jury instruction in the instant case failed to communicate properly "substantive limitations" by which the jury was constitutionally governed in determining the obscenity of the materials before it. The error in the instruction was prejudicial.

II. THE TRIAL COURT'S ERROR IN REFUSING TO ADMIT PROPER COMPARABLE EVIDENCE OFFERED AS PROOF OF COMMUNITY STANDARDS WAS COMPOUNDED BY THE ERROR OF THE COURT OF APPEALS IN REFUSING TO REVIEW SUCH ISSUE BECAUSE OF ITS RELIANCE UPON THE CONCURRENT SENTENCE DOCTRINE.

At the trial of this case, the petitioner sought to introduce two films in support of his contention that the materials for which he was being prosecuted did not violate local community standards. As a foundation for this evi-

dence, the petitioner called Whitney Williams, a representative of *Daily Variety*, who testified with respect to the widespread popular acceptance of these two films and their financial success. Despite this testimony, the trial judge refused to allow the jury to see these films.

On appeal, the court below stated that although the trial court did not articulate its reason for exclusion of these films, 551 F.2d at 1160, the appellate court found that the films were sufficiently similar to the film in issue, and that the offered films for that reason would have been admissible as comparison evidence, assuming the defense had proved community acceptance, 551 F.2d at 1161. That court declined, however, to review this issue, basing its refusal on the concurrent sentence doctrine, because the court in any event had determined that the offered films were not comparable to the other materials as to which it had concluded petitioner was validly convicted, and upon which concurrent sentences were imposed.

A. The Court of Appeals Erred in Its Application of the Concurrent Sentence Doctrine.

The concurrent sentence doctrine, as it has evolved from English common law, has been applied by reviewing courts in criminal cases where review is sought of several convictions, sentences have been imposed concurrently, and at least one conviction has been found valid. In such situations, courts, under certain circumstances, have refused to consider arguments relating to the remaining counts. This doctrine reached full development in this Court's decision in *Hirabayashi v. United States*, 320 U.S. 81 (1943). *See* Note, *The Federal Concurrent Sentence Doctrine*, 70 COLUMBIA L. REV. 1099 (1970). In 1969, however, this Court's decision in *Benton v. Maryland*, 395

U.S. 784 (1969), questioned the "haphazard" use of the doctrine and severely limited its application.

In the instant case, the Court of Appeals applied the doctrine as follows:

> "This circuit has adopted the concurrent sentence doctrine which, as enunciated by the Supreme Court in *Benton v. Maryland*, 395 U.S. 784, 791 (1969), is that a federal appellate court, as a matter of discretion, may decide that it is unnecessary to consider argument advanced by an appellant with regard to his conviction under one or more counts of an indictment, if he was at the same time validly convicted of other offenses under other counts and concurrent sentences were imposed." 551 F. 2d at 1161.

This application of the doctrine completely misinterprets this court's explication in *Benton v. Maryland, supra*. In *Benton*, the Court criticized the use of the concurrent sentence doctrine in previous cases both for its "haphazard" use in some instances and its automatic application in others. *Id.*, at 789. The decision then emphasized that although the rationale of the doctrine is unclear, it cannot be used as a jurisdictional bar.

> "One can search through these cases, and related ones, without finding any satisfactory explanation for the concurrent sentence doctrine . . . But whatever the underlying justifications for the doctrine, *it seems clear to us that it cannot be taken to state a jurisdictional rule.* Moreover, whatever may have been the approach in the past, our recent decisions on the question of mootness in criminal cases make it perfectly clear that the existence of concurrent sentences does not remove the elements necessary to create a justiciable case or controversy." *Id.*, at 789-790. (Emphasis supplied).

The doctrine was thus severely limited to cases in which there is no possibility of adverse collateral consequences resulting from a failure to reverse one count of a conviction.

> "In *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed. 2d 917 (1968), we held that a criminal case did not become moot upon the expiration of the sentence imposed. We noted 'the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences.' Id., at 55. We concluded that the mere possibility of such collateral consequences was enough to give the case the 'impact of actuality' which was necessary to make it a justiciable case or controversy. *Sibron* and a number of other recent cases have canvassed the possible adverse collateral effects of criminal convictions, and we need not repeat that analysis here. It is enough to say that there are such possibilities in this case. For example, there are a few States which consider all prior felony convictions for the purpose of enhancing sentence under habitual criminal statutes, even if the convictions actually constituted only separate counts in a single indictment tried on the same day. Petitioner might some day in one of these States have both his larceny and burglary convictions counted against him. Although this possibility may well be a remote one, it is enough to give this case an adversary case and make it justiciable. Moreover, as in *Sibron*, both of petitioner's convictions might someday be used to impeach his character if put in issue at a future trial. Although petitioner could explain that both convictions arose out of the same transaction, a jury might not be able to appreciate this subtlety." *Id.*, at 790. (Footnotes omitted).

The Court thus refused to apply the doctrine and proceeded to review the constitutional claims urged by the petitioner, despite the fact that the possibilities of adverse consequences to Benton were slight in view of his four prior felony convictions spanning thirty years. *See* Note, *The Federal Concurrent Sentence Doctrine*, *supra*, at 1107, fn. 56. Later references to the *Benton* decision in this Court, without delineating its reasons, have reached inconsistent results.

See *Barnes v. United States*, 412 U.S. 837, 849, fn. 16 (1973), in which the doctrine was applied and *Andresen v. Maryland*, ... U.S. ....., 96 S. Ct. 2737, 2743, fn. 4 (1976), in which it was not.

In *United States v. Maze*, 414 U.S. 395 (1974), this Court again emphasized the limited application of the rule when balanced against the defendant's interest in having a conviction reversed.

> "The Court of Appeals determined that even though it affirmed respondent's Dyer Act conviction, for which he had received a concurrent five-year sentence, it should also consider the mail fraud convictions as well. There is no jurisdictional barrier to such a decision, *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed. 2d 707 (1969), and the court decided that 'no considerations of judicial economy or efficiency have been urged to us that would outweigh the interest of appellant in the opportunity to clear his record of a conviction of a federal felony.' 468 F. 2d at 536, n. 6. We agree that resolution of the mail fraud questions presented by this case is appropriate." *Id.*, at 398, fn. 1.

Circuit Courts of Appeal other than the Ninth Circuit have cautiously limited the use of the doctrine to cases

in which no adverse consequences are apparent. In *United States v. Tanner*, 471 F.2d 128 (7th Cir. 1972), *cert. den.*, 409 U.S. 949 (1972), for example, it was stated:

> ". . . [T]he Supreme Court's decision in *Benton v. Maryland*, 395 U.S. 784, 791 89 S.Ct. 2056, 23 L.Ed. 2d 707 (1969), constitutes a reevaluation of the 'concurrent sentencing doctrine.' *Benton* holds that there is no jurisdictional bar (stemming from the requirement of justiciability) to a consideration of all counts under concurrent sentences. The Court points out that an unreviewed count could increase an appellant's future sentencing under an habitual offender statute, or adversely affect his chances for parole, or be used to impeach his testimony at a future trial. *Benton* suggests that review is desirable where adverse collateral consequences of this nature may flow from conviction. . . Since we cannot say that there is no possibility of undesirable collateral consequences attendant upon these convictions, we choose to consider the validity of all the challenged counts." *Id.*, at 140.

Accord, *Crovedi v. United States*, 517 F.2d 541 (7th Cir. 1975); *United States v. McLeod*, 493 F.2d 1186 (7th Cir. 1974); and *United States v. Febre*, 425 F.2d 107 (2nd Cir. 1970), *cert. den.*, 400 U.S. 849 (1971).

This position is also espoused by the Eighth Circuit in cases such as the instant case, where crimes are serious. *United States v. Belt*, 516 F.2d 873, 876 (8th Cir. 1975), *cert. den.*, 423 U.S. 1056 (1976); See also *Sanders v. U. S.*, 541 F.2d 190 (8th Cir. 1976), *cert. den.*, ... U.S. ..... (1977); *cf. U. S. v. Darnell*, 545 F.2d 595 (8th Cir. 1976), *cert. den.*, 429 U.S. 1104 (1977).

In *Ethridge v. United States*, 494 F.2d 351 (6th Cir. 1974), *cert. den.*, 419 U.S. 1025 (1977), the Court applied the doctrine, but Judge McCree's concurring opinion in that case clearly indicates that appellant had made no claim of adverse consequences.

> "I concur because appellant makes no claim that adverse collateral effects may result from the sentences that he challenges here. I do not agree, however, that there exist no circumstances under which possible adverse consequences might be demonstrated." *Id.* at 352. (McCree, Circuit Judge, concurring).

This cautious approach to the use of the doctrine which was advised in *Benton* and which has been followed by other reviewing courts has been ignored by decisions of the Ninth Circuit which have invoked the doctrine routinely and without explanation of the motivating criteria. See, e.g., *United States v. Moore*, 452 F.2d 576 (9th Cir. 1971); *United States v. Hendricks*, 456 F.2d 167, 179 (9th Cir. 1972); *United States v. Ketola*, 455 F.2d 83 (9th Cir. 1972), *cert. den.*, 414 U.S. 847 (1973); and *United States v. Paduano*, 549 F.2d 145 (9th Cir. 1977). The variety between circuits in application of the rule should be clarified by this Court. Petitioner urges that, in light of *Benton* and of the entire panoply of adverse collateral consequences inherent in any criminal case, the rule should be abolished. No interests of judicial economy can possibly outweigh a defendant's interest in having even one felony conviction reversed. See *United States v. Maze, supra.*

In the instant case, the application of the concurrent sentence doctrine was particularly unfair. The collateral effects of possible use for impeachment purposes and increased sentencing for possible subsequent convictions are inherent in any criminal conviction. In addition, it is

quite possible that the jury convicting the defendant on all counts did not keep clearly in mind the nice distinctions between the materials shown to them under each separate count. There is a significant possibility that if the films offered had persuaded the jury that the film in question was not obscene, it would have been less likely to convict on the other counts involving the printed materials.

Also, because the printed material consisted mainly of advertisements, the jury could easily have been influenced by the offered films as evidence of the content of the type of product advertised in the brochures.

Finally, the length of the concurrent sentences imposed by the trial judge might very well have been determined by the fact that the defendant was found guilty on all counts. *Cf. United States v. Yates*, 355 U.S. 66 (1957) (remand for resentencing ordered where conviction on one of a number of counts was affirmed).

In order that a defendant's constitutional rights be preserved, it is urged that this Court abolish the concurrent sentence doctrine or, in the alternative, that the prejudice of collateral adverse effects of a criminal conviction be presumed unless a contrary showing is made by the government. *See* Note, *The Federal Concurrent Sentence Doctrine, supra,* at 1111. A defendant's ability to vindicate his constitutionally guaranteed rights cannot depend on the unguided exercise of discretionary powers by the separate Courts of Appeal.

The court below restricted its review of the trial court's refusal to admit the offered films solely to the film charged in Count 9 of the indictment, stating that the other materials "were of a different medium." *Id.*, 551 F.2d at 1155. Although the other materials were still pictures rather than motion picture film, they nonetheless in large measure

constituted photographs which depicted the same explicit sexual conduct which appeared in the series of photographs which comprised the films. If, as this court has observed, there is no distinction "as to the medium of expression", *Kaplan v. California*, 413 U.S. 115, 119 (1973), in determining whether a particular form of expression is obscene, it must follow that comparable material contained in the films should have been made available to the jury when it considered the other graphic depictions of sexual acts depicted in the still photographs in the other counts. Review of the trial court's refusal to admit the films, therefore, should not have been limited solely to the one count in the indictment pertaining to a film. The offered evidence was relevant as well to the other ten charges involving printed material.

The constitutional due process right of petitioner to present relevant evidence in his defense has been clearly recognized. *Smith v. California*, 361 U.S. 147, 165 (1959) (Justice Frankfurter, concurring), 171 (Justice Harlan concurring in part and dissenting in part) (see discussion, *infra*, pp. 33-36). The error resulting from the refusal to admit the offered films, therefore, should have been considered quite apart from the concurrent sentence doctrine. Such independent examination was required to determine whether, notwithstanding that the films were erroneously refused as to the film count, the refusal also constituted error as to the remaining counts. Under such circumstance, the reviewing court was required to determine not only whether the refusal to admit the offered films might have "contributed to the conviction", *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963), but also whether the prosecution had established "beyond a reasonable doubt", that such failure to admit the films was not prejudicial to the petitioner, *Chapman v. California*, 386 U.S.

18, 24 (1967). No such showing has been made by the Government, and for good reason: no such showing is possible upon the record below.

The comparison films which the trial court refused to admit into evidence depicted explicit sexual activity of the same kind, variety, frequency and vividness as that contained in the charged material here in issue. If, after proof of widespread acceptance of such films in the community, the trial court had permitted the jury to view these comparison films, with the consequent defense summation and jury charges that would flow from such vigorous defense evidence, a more effective defense in an obscenity prosecution can scarcely be imagined. There can be little doubt that a powerful showing of community acceptance of the similar charged materials would have been made which *might* have affected the jury's verdict on *all* of the counts, and that is all that the *Fahy-Chapman* rule requires in order to insure reversal for constitutional error at the trial.

B. The District Court Erred in Excluding the Comparison Evidence.

If the Court of Appeals below had not been deterred by the concurrent sentence doctrine from its review of the comparable films offered by the petitioner, it is here contended that it should have found reversible error in the failure of the trial court to admit them into evidence.

The importance of comparison evidence in the trial of a case involving allegedly obscene materials has long been recognized. Such evidence is often offered to demonstrate levels of community standards or tolerance; its rejection for such a purpose constitutes a denial of due process:

". . . I agree with my Brother Frankfurter that the trier of an obscenity case must take into account 'contemporary community standards,' *Roth v. United States*, 354 U.S. 476, 489, 77 S.Ct. 1304, 1311, 1 L.Ed. 2d 1498. This means that, regardless of the elements of the offense under state law, the Fourteenth Amendment does not permit a conviction such as was obtained here unless the work complained of is found substantially to exceed the limits of candor set by contemporary community standards. The commuinty cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates. This being so, it follows that due process—'using that term in its primary sense of an opportunity to be heard and to defend [a] substantive right,' (citation omitted) —requires a State to allow a litigant in some manner to introduce proof on this score. While a State is not debarred from regarding the trier of fact as the embodiment of community standards, competent to judge a challenged work against those standards, it is not privileged to rebuff *all* efforts to enlighten or persuade the trier." *Smith v. California*, 361 U.S. 147, 171 (1959). (Justice Harlan concurring in part and dissenting in part) (footnotes omitted).

This Court in *Hamling v. United States*, 418 U.S. 87, 125 (1974), reaffirmed its position that a ". . . defendant in an obscenity prosecution, just as a defendant in any other prosecution, is entitled to an opportunity to adduce relevant competent evidence bearing on the issues to be tried." That decision held, however, that in the particular case before it, such evidence was properly excluded because: (1) a "deluge" of material was offered (*Id.*, at 135); and (2) defendant's claim that it was accepted by the community was based upon proof that these materials were available for purchase, that some had received second-class mailing privileges, and that others had been judged non-obscene in prior adjudications. These facts were held insufficient to establish community acceptance. *Id.*, at 125-126.

The situation in the instant case is quite different. Here, it was demonstrated by a witness who was permitted to testify by the District Court that the two films offered were box office successes, rated first and third on the list of the ten most financially successful films of the year in Los Angeles. More than one-half million people in Los Angeles saw "Deep Throat" and more then 240,000 saw "The Devil in Miss Jones", paying an admission price of five dollars per person. It is difficult to imagine a stronger showing of widespread acceptance within the community. Despite the laying of this foundation, however, the trial judge refused to allow the jury to see the films themselves, thus leaving the defense witness's testimony floating in a vacuum, depriving the jury of any concrete evidence of the character of the material, and permitting the jury to speculate as to the actual content, for comparable purposes, of the films whose broad community acceptance had been undisputedly demonstrated. This clearly was error. The jury should have been permitted to view and compare the explicit sexual depictions in the offered films with the depictions contained in the prosecution's exhibits.

That the introduction of the offered films was critical to give full meaning to the testimonial evidence concerning their community acceptance is borne out by Chief Justice Burger's recognition in *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 56 (1973), that "[t]he films, obviously, are the best evidence of what they represent." These films, whose similarity to the film in issue was acknowl-

edged by the court below and whose community acceptance was proved, thus constituted the best evidence that the petitioner had to present to the jury to support his plea of "not guilty". These films were in a sense "expert testimony" which the petitioner had a right to present as a matter of due process of law. As stated by Justice Frankfurter, concurring in *Smith v. California, supra*:

> "Therefore, to exclude such expert testimony is in effect to exclude as irrelevant *evidence that goes to the very essence of the defense* and therefore to the constitutional safeguards of due process." *Id.*, 361 U.S. at 165. (Frankfurter, J., concurring). (Emphasis supplied).

Although the District Court gave no specific reason for its exclusion of these films, the Court of Appeals ruled that they were sufficiently similar to the films at issue here that they met one criteria of the test for admissibility. This test has been established to be twofold. The foundation required must demonstrate, *first*, that the materials offered be similar to the materials at issue and, *second*, that the offered materials enjoy a "reasonable degree of community acceptance." *Womack v. United States*, 294 F.2d 204 (D.C. Cir. 1961), *cert. den.*, 365 U.S. 859 (1961); *United States v. Womack*, 509 F.2d 368, 376 (D.C. Cir. 1972), *cert. den.*, 422 U.S. 1022 (1975); *United States v. Jacobs*, 433 F.2d 932, 933 (9th Cir. 1970). Where, as in the instant case, the court below has ruled favorably on the issue of similarity and the petitioner demonstrated overwhelming community acceptance, error on the part of the District Court in refusing admission of the films is conclusively demonstrated.

The importance of allowing the defense in an obscenity prosecution to introduce proper comparison evidence has

been discussed by a number of state courts. In *Yudkin v. State*, 229 Md. 223, 182 A.2d 798 (1962), the Court reviewed evidence offered as comparable to the novel, THE TROPIC OF CANCER.

> ". . . And because the trier of the facts is required under the *Roth* obscenity test to apply 'contemporary community standards' in determining what is and what is not obscene, [as it is under the *Miller* test], it is essential that the jury or court, instead of being required to depend on what may well be a limited knowledge of the moral and literary standards of the community, has a right to read, or to be informed of, the contents of comparable books that have been generally accepted or tolerated by the public." *Id.*, at 802. (Bracketed material supplied).

Exclusion of such evidence has been held to be reversible error:

> "Accordingly, we are required to hold that it is error for a trial court to deny, or unreasonably curtail a defendant's right in an obscenity case to introduce into evidence otherwise competent and non-repetitive testimony or exhibits which directly relate to or bear upon the absence of any or all of the elements of the *Miller* obscenity test. To hold otherwise would, so it seems to us, authorize the entirely impermissible situation where a court, sitting as here, in equity without the benefit of a fact-finding jury and not required to empanel an advisory jury, would become the sole arbiter unassisted by and uninstructed through the testimony of competent witnesses, of those community standards which are essential to the definition of what is, or is not, prurient and patently offensive and therefore obscene, and thereby deny to the de-

fendant in the cause the opportunity required by due process of law to present evidence favorable to his position." *State ex rel. Leis v. William S. Barton Co., Inc.*, 45 Ohio App. 2d 249, 344 N.E. 2d 342, 351 (1975).

Accord, *In re Harris*, 16 Cal. Rptr. 889, 366 P.2d 305 (1961); *Pierce v. State*, 296 So. 2d 218 (S. Ct. Ala. 1974), *cert. den.*, 419 U.S. 1130 (1975); and *Woodruff v. State*, 11 Md. App. 202, 273 A.2d 436 (1971).

The exclusion of comparison evidence in this case was arbitrary and unsupported by any proper ground. This Court should reaffirm the constitutional right of a defendant in an obscenity prosecution to offer relevant comparison evidence.

Moreover, in the exercise of its supervisory powers, this Court should find that it was an abuse of discretion for the trial court to have refused the offered comparables where the similarity of the material to the material charged was clear and so found by the court below, community acceptance of the offered evidence was clearly and without dispute proved at the trial level, and the trial court failed to allow the jury to view the films after the foundation for the admission of the material was permitted at the trial to demonstrate that the two films had received broad community acceptance in the Los Angeles area.

III. A JURY SHOULD NOT BE CHARGED TO DETERMINE THE OBSCENITY OF MATERIAL UPON CONSIDERATION OF ITS APPEAL TO DEVIANT SEXUAL GROUPS IN THE ABSENCE OF SUFFICIENT EVIDENCE DEMONSTRATING APPEAL AND DISSEMINATION TO SUCH GROUPS.

The trial court charged the jury:

"The first test to be applied in determining whether a given picture is obscene, is whether the predominant theme or purpose of the picture, when viewed as a whole and not part by part, and *when considered in relation to the intended and probable recipients, is an appeal to* the prurient interest of the average person of the community as a whole or *the prurient interest of members of a deviant sexual group* at the time of mailing. (App. 56-57). (Emphasis supplied).

* * * * *

"In applying this test, the question involved is not how the picture now impresses the individual juror, but rather, *considering the intended and probable recipients,* how the *picture would have impressed* the average person, or *a member of a deviant sexual group* at the time they received the picture." (App. 57). (Emphasis supplied).

Petitioner objected to those parts of the foregoing charge which permitted the jury to consider the effect of the material on members of sexually deviant groups (R.T. 630) on the ground that sufficient evidence on the elements of appeal to prurient interest of sexually deviant groups had not been presented by the prosecution. The trial court's overruling of petitioner's objection was approved by the court below, which held upon the authority

of *Mishkin v. New York,* 383 U.S. 501 (1966), that evidence of design and dissemination, as well as evidence which clearly defines the group was not a prerequisite to the charge, that in any event sufficient evidence on the question was presented through the prosecution's rebuttal witness, and that the deviant appeal charge was similar to that approved by this court in *Hamling v. United States, supra,* 418 U.S. at 129 (1974), for which reasons the charge was approved. *United States v. Pinkus, supra,* 551 F.2d at 1158-59.

In *Mishkin v. New York, supra,* this Court carefully detailed not only the content of the fifty books involved in the case, but also recounted the evidence presented at trial as to their cost of production, sales price, massive number, and even the detailed instructions given by the defendant to the authors of the publications with respect to the deviant sexual practices he wanted portrayed in the books. It was in light of the extensive record of evidence that clearly established that the material was designed for and intended to be disseminated to members of a deviant sexual group that this Court determined that a charge as to material directed to deviants was permissible. The Court stated:

> "Where the material is *designed for and primarily disseminated* to a *clearly defined* deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. The reference to the 'average' or 'normal' person in *Roth,* 354 U.S. at 489-490, 77 S.Ct. at 1311, does not foreclose this holding. In regard to the prurient-appeal requirement, the concept of the 'average' or 'normal' person was employed in *Roth* to serve the

> essentially negative purpose of expressing our rejection of that aspect of the *Hicklin* test, *Regina v. Hicklin* (1868), L.R. 3 Q.B. 360, that made the impact on the most susceptible person determinative. *We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group;* and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons, it also avoids the inadequacy of the most-susceptible-person facet of the *Hicklin* test". *Id.,* 383 U.S. at 508-509. (Emphasis supplied).

A comparison of the evidence of appeal to deviant groups appearing in the record in the case at bar and that presented in *Mishkin* and *Hamling,* compels the conclusion that in the instant case the prosecution never intended to establish an evidentiary basis for the charge on appeal to deviant groups. First, no evidence on the issue was presented by the prosecution in its case-in-chief. Only in rebuttal did the prosecution produce a witness who did not define or describe the groups but, in the words of the court below, merely testified that the materials appealed to "the prurient interest of homosexuals, sado-masochists and those interested in group sex." *Id.,* at 1158-1159, n. 7. The witness also testified that the same material had prurient appeal to both average and deviant persons. (App. 41).

Second, no evidence whatever was offered to show that the materials were designed for or disseminated to any deviant group, whether defined or not. Nor was the jury instructed that it was required to find that petitioner had caused the materials to be designed for such deviant groups before it applied the test of prurient appeal. There

was also no instruction that the jury find that the deviant groups had been clearly defined by the evidence.

In *Hamling v. United States, supra,* contrary to the statement of the court below as to the non-existence of evidence on specific deviant appeal, there was indeed substantial evidence, including expert testimony, as to deviant appeal, and massive distribution of the materials, which permitted an inference to be drawn as to design and distribution to an "intended and probable recipient group." *Mishkin v. New York,* 383 U.S. 502, quoted in *Hamling v. United States,* 418 U.S. at 129. Moreover, this Court itself concluded that there was sufficient evidence in *Hamling* to support the charge on appeal to prurient interest of deviant groups. The conclusion of the court below that *Hamling* can be read as dispensing with the necessity of evidence on prurient appeal simply belies both the record and the statements of this Court in that case.

The court below also relied on *United States v. Hill,* 500 F.2d 733 (5th Cir. 1974), *cert. denied,* 420 U.S. 952 (1975). The court's reliance on *Hill* was misplaced. The only issue in *Hill* was whether the charged material, which apparently exhibited deviant conduct, required the prosecution to introduce expert testimony to make a *prima facie* case, an issue entirely divorced from that which this case presents: whether the prosecution was entitled to a charge on prurient appeal to deviant groups. Although the Court of Appeals in *Hill* stated that expert testimony was not required where deviant sexual conduct was portrayed in the exhibits which were received in evidence, the court's opinion does not reveal whether the trial court charged the jury on appeal to deviant groups; if it did so, no issue as to such charge was presented to the appellate court.

In a footnote to its opinion,[6] the court below conceded that there was "some support" for petitioner's contention that an evidentiary foundation was required to support a charge on prurient appeal to deviant groups. In *Paris Adult Theater I v. Slaton,* 413 U.S. 49 (1973), after concluding that expert testimony as to the obscenity of the materials was not required if the materials are placed in evidence, Chief Justice Burger stated, in a footnote:

> "We reserve judgment, however, on the extreme case, not presented here, where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest. See *Mishkin v. New York,* 383 U.S. 502, 508-510 (1966); *United States v. Klaw,* 350 F. 2d 155, 167-168 (C.A. 2d 1965)." *Id.,* 413 U.S. at 56, fn. 6.

In *Mishkin,* this Court emphasized the evidentiary basis for implementation, by instruction to the jury, of the rule there decided. The Court stated, "Not only was there proof of the books' prurient appeal . . . but the proof was compelling." *Id.,* 383 U.S. at 510. This was in sharp contrast to the record in *United States v. Klaw,* 350 F.2d 155 (1965), in which Judge Moore found no such proof after searching the record. Judge Moore observed that where the material in issue is purportedly directed toward members of a deviant group, the necessity for evidence showing the existence of prurient appeal to such group is even more critical:

> "*[I]f proof of prurient stimulation and response is generally important, it is particularly necessary when [the] prurient interest may be that of a deviant segment*

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6. *United States v. Pinkus,* 551 F.2d at 1158-1159 fn. 7.

of society whose reactions are hardly a matter of common knowledge. It may well be that there are characters and cults to which exaggerated high heels, black patent leather bindings and bondage poses have some occult significance, but we doubt that any court would take judicial notice of the reaction that deviates —or the average man—might have to such stimuli. However, some proof should be offered to demonstrate such appeal, thereby supplying the fact-finders with knowledge of what appeals to prurient interest so that they have some basis for their conclusion." *Id.*, 350 F.2d at 166. (Emphasis supplied).

The court in *Klaw* thus concluded:

"In this case, the jury had insufficient evidence even to 'recognize' that the material appealed to the prurient interest of the average person. *It had absolutely no evidentiary basis from which to 'recognize' any appeal to the prurient interest of the deviate or the typical recipient—a class never really defined in the record.* Because there was insufficient evidence for the jury to consider Nutrix material 'obscene' under any proper view of the Roth test, the motion for directed verdict of acquittal should have been granted." *Id.*, at 167-168. (Footnote omitted, emphasis supplied).

Petitioner therefore urges the Court to determine that where the record fails to contain evidence which demonstrates that the material in issue was designed for and disseminated to a clearly defined sexually deviant group, and further fails to show that the material appealed to the prurient interest of the members of such deviant group, it was error for the trial court to have instructed the jury to determine the obscenity of the materials in issue by reference to its effect on such groups.

Petitioner further urges the Court to determine that in any event the charge on deviant appeal as given was insufficient by reason of the failure of the trial court to instruct the jury that prior to its consideration of effect of the materials on deviants it was first required to find that the materials had been designed for and primarily disseminated to a clearly defined sexual group.

IV. IN A FEDERAL OBSCENITY PROSECUTION WHERE THERE IS NO EVIDENCE OF PANDERING, IT IS ERROR TO CHARGE THE JURY ON PANDERING AND WHERE PANDERING IS CHARGED UNDER SUCH CIRCUMSTANCES, THE ERROR IS COMPOUNDED BY DIRECTING THE JURY TO CONSIDER FACTS NOT IN EVIDENCE.

The trial court also instructed the jury on pandering obscenity, as follows:

"Having covered the three elements of obscenity, there is one additional matter that you may consider, and that is the matter of pandering. You must make the decision whether the materials are obscene under the test I have given you. *In making this determination you are not limited to the materials themselves. In addition, you may consider the setting in which they are presented. Examples of what you may consider in this regard are such things as: manner of distribution, circumstances of production, sale and advertising. The editorial intent is also relevant. What you are determining here is whether the materials were produced and sold as stock in trade of the business of pandering. Pandering is the business of purveying textual or graphic matter openly advertised to appeal to erotic interest of the customer.*

"The question of obscenity is to be answered by application of the basic test recited earlier, but *if you find this to be a close case under that test, then you may consider the evidence of pandering to assist you in your decision.* Such evidence is pertinent to all three elements of the basic test of obscenity.

"*The circumstances of presentation and dissemination of material are especially relevant to a determination of whether the social importance claimed for the material is pretense or reality,* or whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. *Where the distributors' sole interest is on the sexually provocative aspects of the publications, that fact may be decisive in the determination of obscenity.*

"In summary, evidence of pandering simply is useful in applying the basic obscenity test where an exploitation of interest in titillation by pornography is shown with respect to the material lending itself to such exploitation through pervasive treatment or description of sexual matters. Such evidence may support the determination that the material is obscene, even though, in other context, the material would escape such condemnation." (App. 59-60). (Emphasis supplied).

The foregoing instruction, given over objection of petitioner (R.T. 644-651; 729-730; 735), presents two issues:[7]

7. Petitioner urges as a third issue, if the same is deemed to be included as a "subsidiary question" to the questions presented for review in the petition and not additional thereto (See, Supreme Court Rule 40.1(d) (1) and (2)), that a charge on pandering in general, and specifically as to statements of petitioner appearing in the brochures received in evidence, as well as the commercial aspects of the materials, is constitutionally

(Continued on following page)

First, whether an instruction on pandering is appropriate in the absence of any evidence of pandering to support the charge. *Second,* assuming some narrow basis for such charge, whether it was error to instruct the jury to consider specific matters relating to pandering about which there was no evidence whatever.

A. There Was Insufficient Evidence to Support Any Charge of Pandering.

The genesis of the consideration of pandering as an adjunct to the determination of obscenity was *Ginzburg v. United States,* 483 U.S. 463 (1966). In *Ginzburg,* this Court stated that "there was *abundant evidence* to show that each of the accused publications was originated or sold as stock in trade of the sordid business of pandering. . . ." *Id.,* 383 U.S. at 467 (Emphasis supplied). The evidence included testimony with regard to the mailing privileges and post office locations secured by the defendant, the substantial number of copies mailed (5500—of one of the publications), the editorial goals and practices of the defendant, described by one of defendant's former writers, *cf. Mishkin v. New York,* 383 U.S. 502 (1966), and "much additional evidence supporting the petitioner's pandering" *Ginzburg, supra,* 383 U.S. at 470, fn. 11, not recounted by the Court in its opinion. In *Mishkin v. New York, supra,* 383 U.S. at 505-506, this Court also detailed

Footnote continued—

impermissible in light of the Court's decision in *Virginia State Board of Pharmacy v. Virginia Consumer Council, Inc.,* 425 U.S. 748 (1976), in which commercial speech was found to be protected by the First Amendment. Petitioner urges as an alternate ground for reversal that the pandering charge should not have been given under any circumstance. *Ginzburg v. United States,* 383 U.S. 463 (1966), has, by implication, been overruled. See opinion of Justice Stevens, dissenting in *Splawn v. California,* ..... U.S. ....., 45 U.S.L.W. 4574, 4576-4577 (1977). "*Ginzburg* cannot survive *Virginia Pharmacy.*" *Id.,* at 4577.

the evidence showing defendant's methods of operation and instructions to his authors to support a charge that the material was conceived and marketed to specific groups, which evidence was relevant to the jury's consideration of the obscenity of the materials.

Likewise, in *Hamling v. United States*, 418 U.S. 87 (1974), in which the pandering principle of *Ginzburg* was reaffirmed, *id.*, at 130, the record was shown to contain substantial testimonial evidence of the defendant's methods of operation and distribution of the materials in issue.

In the case before this Court, there was no evidence whatever presented at the trial of the kind detailed by the Court in *Ginzburg, Mishkin* or *Hamling*. The prosecution's case-in-chief was presented upon a stipulation that the material was mailed to certain identified recipients whose occupations were noted. The exhibits were offered and received in evidence and the jury viewed the film. Petitioner contends that with the paucity of evidence presented, the jury should not have been instructed or permitted to consider pandering of the material.

The court below found sufficient "information", 551 F.2d at 1160, in the stipulation and materials to support the charge on pandering. This conclusion was based on a finding that the materials were indiscriminately mailed and represented by petitioner as erotically arousing.

It is important to note that the prejudice resulting to the petitioner from the pandering charge cannot be determined by the language contained in the charge itself, or by rationalizing, as did the court below, that the jury was not expressly "instructed" to consider matters upon which there was no evidence. The effect of the pandering charge was far more sweeping. By allowing the

charge on pandering, the trial court gave the prosecutor a green light to argue the pandering issue to the jury. And whereas the record to that point was silent on the issue, the floodgates were opened and the prosecutor was thus permitted to comment on the pandering conduct of the petitioner.

The prosecutor discussed pandering at length and emphasized to the jury that "we have evidence showing . . . commercial exploitation" (R.T. 731). He addressed them extensively on "examples of widepread pandering of this material" (R.T. 733), and urged them to conclude as he had that "the material is so outrageously pandered". (R.T. 738) (See, generally, the prosecutorial comments on pandering, R.T. 731-38, 781-82).

Whatever evidence of pandering which may have appeared in the stipulation and the exhibits was so disproportionately augmented by the prosecutor's argument that the charge must be recognized as prejudicial. The prosecution here, too, has the burden of showing beyond a reasonable doubt that the pandering charge was not prejudicial to petitioner. *Chapman v. California*, 386 U.S. 18 (1967) and *Fahy v. Connecticut*, 375 U.S. 85 (1963). That burden cannot be met by the government, not only because the prosecution stressed pandering in its argument to the jury, but because the jury, by virtue of its request that the pandering charge be reread to it, clearly indicated that pandering was decisive to its deliberations.

Until the departure from its established practice by its ruling in the case at bar, the Ninth Circuit Court of Appeals had refused to affirm convictions in which the jury was charged on pandering without substantial evidence to support such charge. *United States v. Baranov*, 418 F.2d 1051, 1053 (9th Cir. 1969), and *Grant v. United States*, 380

F.2d 748 (9th Cir. 1967). The court below relied on its decision in *United States v. Pellegrino*, 467 F.2d 41 (9th Cir. 1972), in which an advertising brochure was held not to constitute pandering "as the term is used in *Ginzburg*", 467 F.2d at 46, to extrapolate a rule which would permit a charge on pandering by virtue of the content of the brochure itself and nothing more. *United States v. Pinkus, supra*, 551 F.2d at 1159-1160. The pandering principle conceived in *Ginzburg*, however, requires more substantial evidence as proof of pandering than just the material which forms the basis of the charge in the first instance.

If this Court determines that pandering is to be retained as a factor in the determination of obscenity,[8] petitioner urges the Court to hold that substantial evidence of pandering is a precondition to the injection of pandering as an issue in an obscenity prosecution, and that in the case before this Court the evidence was insufficient to warrant the trial court's charge.

B. The Charge on Pandering Invited the Jury to Consider Matters Not in Evidence.

Even if this Court were to conclude that the jury was entitled to consider the content of the brochures or advertisements under a pandering charge (which petitioner denies), the charge in this case went far beyond the specific content of the advertising materials offered in evidence at the trial.

The trial judge instructed the jurors that they could consider the "setting" in which the materials are presented, including "manner of distribution, circumstances of production, sale and advertising." (App. 60). There was

8. See footnote 7, *supra*.

no evidence whatever of the manner of distribution, sale or advertising of the materials other than the bald stipulation that they were mailed for the personal use of the recipient. And there was no evidence whatever concerning circumstances of production. Accordingly, this instruction invited the jury to consider matters not in evidence.

The court below approved the charge on the basis that the items enumerated by the trial judge were only examples, and that because the occupations of the recipients were known to the jurors, they could infer that distribution was not to a particular professional group. 551 F.2d at 1160. However, the occupations of the recipients could supply no inference whatever as to the circumstances of production, sale or advertising, nor any of the sort of detail concerning manner of distribution which has been present in other cases in which this Court has approved pandering charges.

The critical importance of the pandering instruction in this regard is unmistakably evident from the fact that the jury specifically asked for a re-reading of that instruction after it had retired to deliberate (App. 63-65). In fact, this request was the only question submitted by the jury during its deliberations. Thus, the objectionable language pertaining to pandering was repeated to the jury a second time, and received yet greater emphasis.

This Court has held that it is error to give even a correct charge on facts which are not in evidence.

> "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if

there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjecture, instead of weighing the testimony." *United States v. Breitling*, 20 How. 252, 254-255, 61 U.S. 252, 254-255 (1858).

The lack of evidence on the specific matters upon which the trial judge invited the jurors to speculate is sufficient cause for reversal of petitioner's conviction.

CONCLUSION

This Court has made clear that obscene utterances, as distinguished from other forms of expression, are not protected by the First Amendment as a matter of substantive law, *Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, 415 U.S. 15 (1973). But it has never suggested that because the content of a book or film may be shoddy, it is for that reason entitled only to a watered down version of the procedural protections which are guaranteed other more genteel forms of expression. For it is where the form of expression is most shocking, most offensive to the community at large, that procedural safeguards must be afforded in their most undiluted form in order to insure that community outrage will not be substituted for the "sensitive tools," *Speiser v. Randall*, 357 U.S. 513, 525 (1958), necessary to separate protected from unprotected expression. *Roaden v. Kentucky*, 413 U.S. 496 (1973); *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Cohen v. California*, 403 U.S. 15 (1971).

This case is an unfortunate example of such procedural failure. The court below identified, but condoned,

the existence of numerous improprieties in the trial of this obscenity case. It disapproved of an instruction including children in the community for purposes of assessing community standards. 551 F.2d at 1158. It agreed that there was error in overruling the motion to strike inflammatory testimony of a Government witness. *Id.*, at 1161-1162. It conceded that permitting cross-examination of a defense witness on the effect of pornography on children might have been erroneous, *id.*, at 1160, and its threshold review of the exclusion of defense comparison evidence pointed toward error. *Id.*, at 1161. Notwithstanding these suggestions of error, as well as other unconceded errors detailed in this brief, the court below affirmed petitioner's conviction because "[t]he evidence of obscenity was . . . overwhelming . . . .", *Id.*, at 1160, and because it inferred that petitioner had commercially exploited the materials. *Id.*, at 1159-1160. The affirmance in this case exemplifies the dangerous judicial temptation to sustain a conviction in spite of irregularities of procedure whenever the court perceives that the defendant is a pornographer and the materials he distributes are obscene.

In the face of the unequivocal decisions of this Court, which insist "that regulation of obscenity scrupulously embody the most rigorous procedural safeguards," *Bantam Books v. Sullivan*, 372 U.S. 58, 66 (1963); *Smith v. California*, 361 U.S. 147 (1959), such judicial behavior is indefensible.

It remains for this Court, in the exercise of its federal supervisory power and as a matter of constitutional review, to delineate with some precision the procedures which are required in the trial of a federal obscenity case so that, under this Court's guidelines, appropriate form may protect First Amendment substance. This case, even in its tawdry setting, provides the opportunity to do so.

". . . the materials before us may be garbage. But so is much of what is said in political campaigns, in the daily press, on TV, or over the radio. By reason of the First Amendment—and solely because of it—speakers and publishers have not been threatened or subdued because their thoughts and ideas may be 'offensive' to some." *Miller v. California*, 413 U.S. 15, 44 (1973) (Douglas, J., dissenting).

Petitioner's conviction, as affirmed by the court below, should be reversed.

Respectfully submitted,

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APPENDIX

Title 18, United States Code, Section 1461

§ 1461. Mailing obscene or crime-inciting matter

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

The term "indecent", as used in this section includes matter of a character tending to incite arson, murder, or assassination. As amended Jan. 8, 1971, Pub.L. 91-662, §§ 3, 5(b), 6(3), 84 Stat. 1973, 1974.

No. 77-39

In the Supreme Court of the United States

OCTOBER TERM, 1977

WILLIAM PINKUS D/B/A "ROSSLYN NEWS COMPANY" AND "KAMERA", PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-19a) is reported at 551 F. 2d 1155.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1977. A petition for rehearing was denied on June 6, 1977 (Pet. App. 1a). The petition for a writ of certiorari was filed on July 6, 1977, and was granted on October 31, 1977 (A. 66). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in a federal prosecution for mailing obscene materials and advertisements therefor, the district court's instructions, following the applicable *Roth-Memoirs*[1] standard, properly charged the jury:

(a) not to judge the materials on a personal basis, or "by their effect on a particularly sensitive or insensitive person or group," but rather "by the standard of the hypothetical average person," which is to be determined by considering "the sensitive and the insensitive, in other words * * * everyone in the community"; and

(b) to consider "the community as a whole, young and old, educated and uneducated, the religious and irreligious, men, women and children, from all walks of life."

2. Whether the record contained evidence permitting the district court to instruct the jury that, in determining whether the material appeals to the prurient interest, it should consider the interests of the average person in the community as a whole or of members of a deviant sexual group.

3. Whether the evidence justified the district court's instruction on pandering.

4. Whether the district court properly excluded two films offered by petitioner as comparison evidence to show that the materials involved were not obscene under contemporary community standards in the Central District of California.

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[1] *Roth* v. *United States*, 354 U.S. 476; *Memoirs* v. *Massachusetts*, 383 U.S. 413.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Central District of California on 11 counts (A. 3–8) charging that he had mailed obscene materials or advertisements for obscene materials, in violation of 18 U.S.C. 1461. The court of appeals reversed his first conviction because the jury had been charged under the standards set forth in *Miller* v. *California*, 413 U.S. 15, even though the offenses alleged occurred in 1971, when the *Roth-Memoirs* (*Roth* v. *United States*, 354 U.S. 476; *Memoirs* v. *Massachusetts*, 383 U.S. 413) standard applied. See *Marks* v. *United States*, 430 U.S. 188. The case was therefore remanded for a new trial under *Roth-Memoirs*. *United States* v. *Pinkus*, C.A. 9, No. 73–2900, decided April 1, 1975. In 1976, after a jury trial under the *Roth-Memoirs* standard, petitioner again was convicted on all 11 counts. He was sentenced to concurrent terms of four years' imprisonment and was fined $500 on each count, for a cumulative total fine of $5,500.[2] The court of appeals affirmed (Pet. App. 2a-19a).

A. THE EVIDENCE

1. The government's case in chief consisted of the mailed materials, exhibits and a stipulation of facts (A. 13–18; Tr. 134–141). Petitioner stipulated that

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[2] After petitioner's second conviction he was initially fined $1,000 on each count, but in June 1976 the district court reduced the fine to $500 per count so as not to exceed the amount that petitioner had been fined after his conviction at his first trial.

he had "voluntarily and intentionally" used the mails on 11 occasions to deliver "illustrated brochure[s] advertising sex films, books and magazines" as well as a film, "613," and "Bedplay" magazine, with the intention that these materials be for the "personal use of the recipient[s]" (*ibid.*). The recipients of this material, by implication in the stipulation, were adults (A. 12; Tr. 59, 61) who resided in various cities and states across the country (*ibid.*).

Each of the eleven exhibits consisted of an outside envelope addressed to the recipient, stamped from Pitney Bowes postage meter No. 621316, and printed with the return address of Kamera's office (G. Exs. 1–11). Each outer envelope also contained a preaddressed return envelope for use in ordering the advertised materials (G. Exs. 1A, 2B, 3B, 4B, 5B, 6B, 7H, 8B, 9G, 10B, 11D).

In addition, each mailing included at least one four page black and white illustrated brochure advertising films, books and magazines relating entirely to sex.[3] The brochure in four of the mailings included an advertisement for "Bedplay" magazine, and several other magazines, consisting of a photograph of the cover of the magazine next to a photograph focusing

[3] In one mailing (G. Ex. 11C) petitioner also included a green sheet of paper which indicated that he "acquired [the recipient's] name by buying out another mail order house," and requested that the recipient "check the proper box indicating the type of merchandise [he is] most interested in receiving from us," as follows:

"[] Novelties (Rubber Goods)
"[] Fetish (a serious study of Corporal Punishment, etc.)
"[] Gay (Paperbacks, Films, Magazines, Picture Sets)
"[] Hetero (Magazines, Books, Films)."

on the genitals of a man and woman engaged in sexual intercourse. The cover of "Bedplay" itself portrayed the faces of two women lying on either side of an erect penis; seminal fluid is clearly visible on the cheek of one of the women. Another page of the brochure is devoted to photographs displaying explicit sexual conduct and advertising for sale films dealing with lesbianism, sex with artificial devices, group sex, fellatio and cunnilingus.[4] The third page, entitled "Male Order," is devoted to materials aimed at homosexuals, has pictures of oral and anal intercourse and advertises a magazine "Young and Ready." The final page of the magazine advertises "bondage" magazines and has a clip out order form to be used in ordering any of the materials advertised in the brochure. The brochures involved in each count contain a similar order form (G. Exs. 1B, 2A, 3A, 7B).

"Bedplay" magazine itself was one of the mailed objects involved in Count 7 (see, *e.g.*, G. Ex. 7A). It is a thirty-two page magazine which sells for $10 and contains color photographs on each page with little or no written material.[5] The photographs focus on

[4] A caption for the film "Mustachioed Magic" is illustrative. It states: "No Mr. America, but equal in stamina and stamen. His honey blond sex partner really stirs him up in the process and we are sure you will be too."

[5] A few of the captions for the pictures state: "We counted and no less than thirty-five shots from the silver screen, and all came from the old flasheroo. * * * It's a good point that beauty is what sells even unto the realm of porno films. There's nothing more profitable than a pretty girl, be she clothed and retouched in a slick men's magazine or getting some shot up her nostrils in a stag film."

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the genitals of persons engaged in fellatio, cunnilingus, masturbation, anal intercourse and group sex.

Brochures advertising the film "613" were included in two mailings (G. Exs. 8A and 9B). These brochures resembled those previously described but also contained an advertisement for a magazine "Female Pedophilia—A Study of Boys as Sex Partners." The advertisement for "613" was a photograph of group fellatio.

Film "613" itself was included in one of the mailings (G. Ex. 9A). It is a single reel of 8mm. black and white film with no sound track. It involves two men and two women who engage in normal intercourse, anal intercourse, fellatio, cunnilingus and masturbation. The film focuses on the genitals, contains no plot and ends with one man ejaculating onto the hand of a woman who is masturbating him.

The remaining counts involve brochures similar to those advertising "613" and "Bedplay." All devote one page to homosexual materials and one page to bondage, masochism and female domination (see, *e.g.*, G. Exs. 4A, 5A, 6A, 7C, 9D, 9E, 10A, 11A). Some of the brochures also advertise bestiality (see, *e.g.*, G. Exs. 4A, 5A, 6A, 7E, 9E), coercive sex (G. Exs. 7C, 9D), a film entitled "Dirty Old Man" with a photograph of a young teenage girl performing fellatio (G. Ex. 11A), harnesses (G. Ex. 11B), artificial devices (G. Exs. 7G, 11B), and playing cards (G. Exs. 7D, 10A).

2. Petitioner presented several witnesses who testified concerning community standards and the appeal of the materials to the prurient interest of the aver-

age person. Dr. Michael Ward and Reverend Robert Theodore McIlvenna from the National Sex Forum testified about the appeal of petitioner's materials to the prurient interest (Tr. 304–307, 469). Both stated that the average person would find these materials arousing and informational and view them with interest and curiosity. In their opinion, however, the materials did not appeal to a prurient interest in sex (Tr. 368–370, 478). They observed further that even the depictions of bestiality would be viewed as informative by the average person (Tr. 374–375). They stated that the only types of photographs that might appeal to a prurient interest in sex were those relating to necrophilia or sadomasochism (Tr. 500–502). Dr. Ward also testified that he sent people with sexual problems to adult bookstores and movie theaters, "[b]ecause the viewing of the materials in certain situations has tremendous value, a therapeutic value" (Tr. 379).

Both Dr. Ward and Reverend McIlvenna based their conclusion that sexually explicit materials do not appeal to the prurient interest on a survey of the reactions of people who voluntarily attended courses in human sexuality at the National Sex Forum. This survey was taken after the volunteers had viewed films and pictures portraying explicit sexual conduct (Tr. 342). The district court refused to admit the results of that survey into evidence because the people who attended the National Sex Forum came from the entire United States rather than the Central District of California and because the survey sampled only

persons who voluntarily attended the Forum, knowing that they would view sexually explicit materials (Tr. 352–360, 402).

The district court admitted into evidence, however, a more localized survey offered by the defense. Two witnesses, Dr. Roderick Bell and Gayle Essary, employees of a public opinion research firm, presented the results of a survey they had conducted in 1973 in Los Angeles, Orange County and San Bernardino regarding obscenity (Tr. 176–181, 218–219, 226, 268, 271). The survey was conducted primarily in urban areas and did not include all of the Central District (Tr. 242–243). The questions in the survey attempted to discern the degree of public acceptance of explicit sex in films and books available in adult movie theaters and book stores (Tr. 519–535; Def. Exs. G, H, I).

Petitioner also sought to introduce two films, "Deep Throat" and "The Devil in Miss Jones," as comparison evidence (A. 19; Tr. 170). The defense stated that they had been commercially successful in the Los Angeles area and were "just as candid as the material in this case" (A. 20; Tr. 171). Therefore, it was argued, the films were relevant to the jury's determination of community standards. After viewing a portion of "Deep Throat," the court refused to admit either film (A. 20–21, 41–42; Tr. 171–172, 627–628, 693). The court permitted petitioner, however, to introduce evidence that they had been, respectively, the first and third largest money-makers among all

movies shown in Los Angeles in 1973 (A. 21–27; Tr. 283–306).

3. In rebuttal, the government presented Dr. James J. Rue, a licensed marriage, family and child counsellor (Tr. 546–547). He testified that the brochures mailed by petitioner in this case depicted oral sex, group sex, homosexuality, sex with animals, artificial devices, anal sex, masturbatory sex and sadomasochism or sadobondage (A. 33; Tr. 572–573). Dr. Rue stated that he had studied deviant sexual groups and was of the opinion that these materials appealed "to the prurient interest of the average person in the community as well as deviate [sic] particular groups" (A. 33–35, 41; Tr. 571–574, 588–589). Dr. Rue further testified that the publication "Female Pedophilia" and the film "Dirty Old Man" would appeal "to a deviate [sic] group that might be described as a sociopathic type of person" (A. 39–40; Tr. 580–581).[6]

B. THE DISTRICT COURT'S INSTRUCTIONS

The trial court instructed the jury that to satisfy the *Roth-Memoirs* standard for obscenity, it had to find that the materials considered as a whole appealed to the prurient interest in sex, were patently offensive and were utterly without redeeming social value (A.

[6] When asked what the effect of viewing matter similar to the materials in this case would be on the viewer, Dr. Rue also testified that it could have a "deleterious effect upon the marital relationship, or in the minds of the young person who may be contemplating marriage" (A. 37–39; Tr. 578–580).

55; Tr. 804). In determining appeal to the prurient interest the jury was told to use a community rather than a national standard. The court then stated (A. 56–58; Tr. 806–808):

> The first test to be applied, in determining whether a given picture is obscene, is whether the predominant theme or purpose of the picture, when viewed as a whole and not part by part, and when considered in relation to the intended and probable recipients, is an appeal to the prurient interest of the average person of the community as a whole or the prurient interest of members of a deviant sexual group at the time of mailing.
>
> * * * * *
>
> In applying this test, the question involved is not how the picture now impresses the individual juror, but rather, considering the intended and probable recipients, how the picture would have impressed the average person, or a member of a deviant sexual group at the time they received the picture.
>
> Thus the brochures, magazines and film are not to be judged on the basis of your personal opinion. Nor are they to be judged by their effect on a particularly sensitive or insensitive person or group in the community. You are to judge these materials by the standard of the hypothetical average person in the community, but in determining this average standard you must include the sensitive and the insensitive, in other words, you must include everyone in the community.
>
> * * * * *

> In determining community standards, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men, women and children, from all walks of life.

Petitioner objected to the inclusion of "children" and "sensitive" people in determining "the community as a whole" and to the instruction that materials may be obscene because of their appeal to the prurient interests of deviant sexual groups. Each of these objections was overruled (Tr. 630–631, 639–643, 654, 659, 664–669).

Petitioner also objected to a pandering charge (Tr. 644–651). The district court "reviewed all of the exhibits" and "in the light of [their] appeal * * * and the totality of the evidence in this case" (Tr. 735) gave the following instruction on pandering (A. 59–60; Tr. 810–811):

> Having covered the three elements of obscenity, there is one additional matter that you may consider, and that is the matter of pandering. You must make the decision whether the materials are obscene under the test I have given you. In making this determination you are not limited to the materials themselves. In addition, you may consider the setting in which they are presented. Examples of what you may consider in this regard are such things as: manner of distribution, circumstances of production, sale and advertising. The editorial intent is also relevant. What you are determining here is whether the materials were produced and sold as stock in trade of the business of pandering. Pan-

dering is the business of purveying textual or graphic matter openly advertised to appeal to erotic interest of the customer.

The question of obscenity is to be answered by application of the basic test recited earlier, but if you find this to be a close case under that test, then you may consider the evidence of pandering to assist you in your decision. Such evidence is pertinent to all three elements of the basic test of obscenity.

The circumstances of presentation and dissemination of material are especially relevant to a determination of whether the social importance claimed for the material is pretense or reality, or whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. Where the distributors' sole interest is on the sexually provocative aspects of the publications, that fact may be decisive in the determination of obscenity.

In summary, evidence of pandering simply is useful in applying the basic obscenity test where an exploitation of interest in titillation by pornography is shown with respect to the material lending itself to such exploitation through pervasive treatment or description of sexual matters. Such evidence may support the determination that the material is obscene, even though, in other context, the material would escape such condemnation.[7]

C. THE OPINION OF THE COURT OF APPEALS

The court of appeals upheld the instructions.

[7] During its deliberations, the jury requested that the pandering charge be reread and the trial judge did so (A. 63–65; Tr. 822–824).

The court ruled that "[t]he judge's reference here to the sensitive and the insensitive was merely an elaboration on the concept of the total community" (Pet. App. 5a). With respect to the reference to children in the definition of community, the court held the instruction "did not, as [petitioner] contends, result in reducing the adult population of the Central Judicial District of California to reading what is fit only for children. *Compare Butler* v. *Michigan,* 352 U.S. 380 (1957). The *entire community* was explicitly made the appropriate standard for consideration" (Pet. App. 6a; emphasis by court).[8]

The court held that, in the light of the materials themselves and the testimony of the government's rebuttal witness, there was sufficient evidence "to establish that the material was designed and disseminated to a deviant group" (Pet. App. 7a). Moreover, the court held, under the rationale of *Hamling* v. *United States,* 418 U.S. 87, 128, that the jury might conclude that some of the materials in this case could be found to have a prurient appeal to a deviant sexual group (Pet. App. 7a–8a).

[8] The court also stated (Pet. App. 5a–6a) that "the specific inclusion of children is unnecessary in the definition of the community and [that it] prefer[s] that children be excluded from the court's instruction until the Supreme Court clearly indicates that inclusion is proper." Comparing the approval of a similar charge in *Roth* v. *United States*, *supra*, with the caveat in *Ginzburg* v. *United States*, 383 U.S. 463, 465, n. 3, and noting that "community" has not been defined by this Court except geographically, the court concluded that "[t]he error, if any, does not require reversal" (Pet. App. 6a).

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The court also concluded from its review of the exhibits and the stipulation in this case that, except for the mailing location, all of the elements that established pandering in *Ginzburg* v. *United States*, 383 U.S. 463, 470–476, were present here.

The court viewed the two allegedly comparable films. It held that to be admissible as comparison evidence they had to bear a reasonable resemblance to the allegedly obscene materials and had to be supported by evidence that such material enjoys a reasonable community acceptance. It concluded that the films bore a reasonable resemblance, and hence were relevant, only to petitioner's film "613." It declined to determine, however, whether petitioner had shown sufficient community acceptance of the two films to warrant their admission, on the ground that reversal would not affect petitioner's concurrent sentence (Pet. App. 12a–14a).

SUMMARY OF ARGUMENT

I

The trial court properly instructed the jury to consider "the sensitive and the insensitive" in "the community as a whole," as well as "men, women and children, from all walks of life." When these references are viewed, as they must be, in the context of the charge as a whole, they are simply applications of the well-established principle that obscenity *vel non* depends on the average conscience of the entire community. That standard is designed to assure that

jurors will apply an objective standard that focuses neither on the most susceptible nor the most callous elements in the community as a whole. The mention of sensitive persons and children in the district court's charge closely followed the language of the charge this Court approved in *Roth* v. *United States*, 354 U.S. 476, 490. We agree with the court of appeals that the better practice for trial judges is not to refer to children at all, in order to avoid any possibility that less carefully framed instructions might cause the jury to give undue weight to the impact of sexually-oriented materials on this group. In this case, however, the court of appeals correctly held that the instructions as a whole eliminated any risk that this might happen.

II

The record contained evidence permitting the trial court to instruct the jury that it could find the material obscene if it appealed to the prurient interest in sex of members of a deviant group. Under *Mishkin* v. *New York*, 383 U.S. 502, 508, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest of a clearly defined deviant sexual group. The materials here included portions aimed at persons interested in homosexual or sado-masochistic materials. These materials were themselves the best evidence of what petitioner was offering, and to whom. Moreover, the government presented expert testimony to rebut petitioner's presentation on this issue.

III

The evidence justified the instruction on pandering. The advertising materials here were designed to appeal to the erotic interests of the customer. Petitioner's brochures graphically and textually disclose no other purpose, and petitioner claims none. Additional evidence going to petitioner's editorial goals, practices, methods of operations and distribution was not required, because such evidence bears on weight and persuasiveness, not the threshold requirement for a pandering instruction under *Ginzburg* v. *United States,* 383 U.S. 463, 467, which the materials here satisfied.

IV

The district court properly exercised its discretion in excluding the films "Deep Throat" and "The Devil in Miss Jones" as comparison evidence. The concurrent sentence doctrine, invoked by the court of appeals to limit its consideration of this issue, is inapplicable here because petitioner was sentenced to separate fines on each of the eleven counts on which he was convicted. Nevertheless, the record shows that the two films do not meet the prerequisites for comparison evidence: (1) that they bear a reasonable resemblance to the allegedly obscene materials; and (2) that the evidence shows a reasonable degree of community acceptance of the proffered comparison evidence.

The two films were not comparable to the advertising materials because they were in a totally different

medium and format and did not have homosexual or sadomasochistic content. They were also completely different from petitioner's film "613." The comparison films were feature-length color films with music, dialogue, a plot, purported humor and structured cinematic direction, and they were designed for showing in a commercial theater. "613" is a black and white 8 mm. film of poor quality with no soundtrack, dialogue, subtitles, or plot, edited to emphasize only the sexual episodes.

Moreover, the evidence did not show significant community acceptance of the two films in the Central District of California or demonstrate that the average person in that community would not find the films obscene. Petitioner showed only that the films had enjoyed substantial commercial success. He did not account for the views of the large number of adults in the seven counties of the district who did not attend the film, or for the likelihood that many ticket-buyers in Los Angeles were tourists, conventioneers, or repeat viewers. Successful showings of films like "Deep Throat," and "The Devil in Miss Jones," which have been found obscene elsewhere, prove only that there is a market for pornography, not that it is acceptable in the Central District of California as a whole. Introduction of those films would have invited the jury to speculate on the obscenity *vel non* of the comparison films themselves, thereby tending to confuse the issues, and would have made the trial unnecessarily complex. Petitioner had ample opportunity to and did

present other evidence relating to local community standards; the jury, which is the arbiter on this issue, was not persuaded by this evidence.

ARGUMENT

I. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY TO CONSIDER "THE SENSITIVE AND THE INSENSITIVE" IN "THE COMMUNITY AS A WHOLE," AS WELL AS "MEN, WOMEN AND CHILDREN, FROM ALL WALKS OF LIFE"

Petitioner's first conviction was vacated and remanded for retrial under the *Roth-Memoirs* standard (*Roth* v. *United States,* 354 U.S. 476; *Memoirs* v. *Massachusetts,* 383 U.S. 413). The trial judge instructed the jury in terms that this Court had expressly approved in *Roth.* 354 U.S. at 489–490. Petitioner contends that in doing so, the trial judge committed reversible error (Pet. Br. 14–21). The court of appeals correctly rejected that contention.

It is familiar doctrine that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten,* 414 U.S. 141, 146–147. This is so because "'[o]ften isolated statements taken from the charge, seemingly prejudicial on their face, are not so when considered in the context of the entire record of the *trial.*'" *United States* v. *Park,* 421 U.S. 658, 674–675 (emphasis in the original), quoting from *United States* v. *Birnbaum,* 373 F. 2d 250, 257 (C.A. 2), certiorari denied, 389 U.S. 837. These principles are fully applicable to instructions in obscenity cases. *Hamling* v. *United States,* 418 U.S. 87, 107–108.

Equally settled is the rule that the obscenity *vel non* of particular materials must be determined by their "impact upon the average person in the community." *E.g., Roth* v. *United States,* 354 U.S. 476, 490; *Hamling* v. *United States,* 418 U.S. 87, 107; *Smith* v. *United States,* 431 U.S. 291, 304. While "expressions in opinions [of this Court] vacillated somewhat before coming to the position that a national community standard was not constitutionally mandated" (*Smith* v. *United States, supra,* 431 U.S. at 300, n. 6),[9] the concept of "the community as a whole" as the guiding principle has remained constant whatever the geographic limits of the relevant community. "[This] Court has never varied from the *Roth* position" that the average conscience of the "entire community" is the touchstone for obscenity, and not the conscience of "a small, atypical segment of the community." *Smith* v. *United States, supra,* 431 U.S. at 300 n. 6, 305. Thus, in determining obscenity ju-

[9] Although *Roth* v. *United States, supra,* did not define the geographic boundaries of communities' standards, the Court applied a national standard in the cases subsequent to *Roth.* See *Jacobellis* v. *Ohio,* 378 U.S. 184, 195; *Manual Enterprises* v. *Day,* 370 U.S. 478, 488. The national standard was abandoned and a local community standard was adopted in *Miller* v. *California,* 413 U.S. 15, 30–39. One Term later in *Hamling* v. *United States,* 418 U.S. 87, 107, this Court held that an instruction employing a national standard "does not render [the] convictions void as a matter of constitutional law * * *" because such an instruction accomplished the purpose of assuring "* * * that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." In the present cases petitioner was tried under a local community standard, the community being the Central District of California.

rors must "consider the entire community and not simply their own subjective reactions, or the reactions of a sensitive or of a callous minority." 431 U.S. at 301; *Hamling* v. *United States,* 418 U.S. 87, 107.

The reason for the continuing vitality of this concept is evident. As Judge Learned Hand pointed out, the laws regulating obscenity essentially reflect a "compromise between candor and shame at which the community may have arrived here and now." *United States* v. *Kennerley,* 209 Fed. 119, 121 (S.D. N.Y.); see *Jacobellis* v. *Ohio,* 378 U.S. 184, 192 (opinion of Mr. Justice Brennan). Thus, the legal standard for obscenity must necessarily mirror the "average conscience of the time." *United States* v. *Kennerley, supra,* 209 Fed. at 121. To assure that community standards are being applied, jurors must be warned not to analyze the material in terms of their personal, subjective opinions or values. See *Hamling* v. *United States, supra,* 418 U.S. at 107; *United States* v. *Cutting,* 538 F. 2d 835, 841 (C.A. 9), certiorari denied, 429 U.S. 1052.[10]

"[A] juror sitting in [an] obscenity case" must draw on the "knowledge of the community or vicinage

[10] If the jury is instructed to determine obscenity "by the effect of isolated passages upon the most susceptible persons" (*Roth* v. *United States, supra,* 354 U.S. at 489), then its determination is flawed because the jury must base its decision in light of the "community as a whole." *Roth* v. *United States, supra,* 354 U.S. at 490. "[T]he recipient group [must] be defined with more specificity than in terms of sexually immature persons, [and] also avoids * * * the inadequacy of the most-susceptible-person facet of the [*Regina* v.] *Hicklin* [[1868] L.R. 3 Q. B. 360] test." *Hamling* v. *United States,* 418 U.S. 87, 129, quoting from *Mishkin* v. *New York,* 383 U.S. 502, 508–509.

from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." *Hamling* v. *United States, supra,* 418 U.S. at 105. The "average person" has been likened to the "reasonable" man used to measure standards of permissible conduct in other areas of law. *Id.* at 104–105; *Smith* v. *United States, supra,* 431 U.S. at 302.

We now show that under these principles the references in the trial judge's instructions to "the sensitive and the insensitive" and to "men, women and children" were proper, when viewed in light of both the "overall charge" (*Cupp* v. *Naughten, supra*) and the "entire record of the trial" (*United States* v. *Park, supra*).

A. SENSITIVE PERSONS

The district court first generally explained to the jury the three elements of the *Roth-Memoirs* test (A. 55–56; Tr. 804–806).[11] It then explained each ele-

[11] The court stated (*ibid.*): "'Obscene' means something which deals with sex in a manner such that the predominant appeal is to prurient interest; which, when considered as a whole, and not part by part, appeals to prurient interest in a way or manner substantially beyond the acceptable limits of candor in dealing with matters relating to sex, as established at the time of its dissemination by the current standards of the community as a whole, and which is utterly lacking in redeeming social value or importance.

* * * * *

"With regard to the three essential elements just mentioned, you are hereby instructed that in order to find the materials involved in the within case legally obscene the materials must be found to violate all three of the stated elements. Thus, if you should find, for example, that the materials did appeal to the prurient interest

ment in detail. In discussing the first element, "appeal to the prurient interest of the average person of the community as a whole" (A. 57; Tr. 807), it emphasized (*ibid.*):

> Thus the brochures, magazines and film are not to be judged on the basis of your personal opinion. Nor are they to be judged by their effect on a particularly sensitive or insensitive person or group in the community. You are to judge these materials by the standard of the hypothetical average person in the community, but in determining this average standard you must *include the sensitive and the insensitive, in other words, you must include everyone in the community.* [Emphasis added.]

This instruction did not direct the jury to focus on the most susceptible or on the most callous. As the court of appeals noted, it "was merely an elaboration on the concept of the total community. The trial judge specifically said * * * that the materials were *not* to be judged by their effect on a particularly sensitive person" (Pet. App. 5a; emphasis by court). In *Roth,* the trial court had charged, in language that this Court approved (354 U.S. at 490):

> The test is not whether it would arouse sexual desires or sexual impure thoughts in those

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and did violate contemporary community standards but was not 'utterly without redeeming social importance' you must acquit. Likewise if, for example, the materials did violate contemporary community standards and was 'utterly without redeeming social importance' but did not appeal to the prurient interest, you must acquit. The point is the materials must violate all three of the stated three essential elements in order for you to find that it is legally obscene."

> comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved * * *.

The district court's charge in the instant case fairly restated the substance of that instruction from *Roth* (A. 57; Tr. 807).

Petitioner nevertheless contends (Br. 22) that the instruction is defective because it requires "the jury to *include* the sensibilities of *'everyone'* in the community in its deliberations before calculating the average level of sensitivity." He argues that jurors cannot know everyone in the community and cannot "intelligently * * * apply an equation which requires them to arrive at the median" (*ibid.*).

This argument misconceives the jury's function. It is not computing "some abstract formulation" (*Miller* v. *California,* 413 U.S. 15, 30) or resolving a statistical equation to determine a mathematical average. Its function is to "take account of all the components that comprise the community as a whole." *United States* v. *Treatman,* 524 F. 2d 320, 323 (C.A. 8).

In sum, "contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in [the] community * * *." *Smith* v. *United States, supra,* 431 U.S. at 305. The district court's charge correctly emphasized that this understanding must be objective and inclusive of the community as a whole.

In emphasizing to the jury the importance of the community as a whole, the trial court also said (A. 58; Tr. 808):

> In determining community standards, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men, women and children, from all walks of life.

Like the reference to "the sensitive and insensitive," this single sentence from the instruction was part of the court's emphasis on an objective test of average community attitudes.

It closely followed the charge in *Roth* (354 U.S. at 490):

> In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a *whole, young and old, educated and uneducated, the religious and the irreligious—men, women and children.* [Emphasis added.]

This Court stated in *Roth* that the trial court had "followed the proper standard" and had "used the proper definition of obscenity" in its instructions. *Id.* at 489.

Petitioner contends (Br. 20) that any reference to children is necessarily an invitation to the jury to look to the most susceptible members of the community in determining applicable standards. As the Court's approval of the instruction in *Roth* indicates, however, that is not so if the instructions as a whole make it clear that the jury must not assess material by its effect on the most susceptible.[12]

The charge here did so. It expressly warned the jurors not to judge the materials by their effect on the particularly sensitive (or insensitive) (A. 57; Tr. 807). It stated some nine times that the community as a whole and the reaction of the average person is the proper standard (A. 57–59; Tr. 806–809).

Petitioner contends (Br. 18–19) that the court did not approve this part of the charge in *Roth* because it subsequently made the following statement in *Ginzburg* v. *United States,* 383 U.S. 463, 465, n. 3:

> We are not, however, to be understood as approving all aspects of the trial judge's exegesis of *Roth,* for example his remarks that "the community as a whole is the proper consideration. In this community, our society, we have children of all ages, psychotics, feeble-minded and other susceptible elements. Just as they cannot set the pace for the average adult reader's taste, they cannot be overlooked as part of the community." 224 F. Supp. [129, 137 (E.D. Pa.)]. Compare *Butler* v. *Michigan,* 352 U.S. 380.

[12] The *Roth* instruction elaborated on the point that neither the sensitive nor the insensitive are the barometer for determining obscenity by emphasizing that the standard is that of the "average person" in the "community as a whole." 354 U.S. at 490. To further illustrate "the community as a whole," the charge listed a series of opposites for the jury, including "the religious and the irreligious," so that the jury would not select its "average person" from a distorted, subjective view of society. The instructions here followed the same approach (A. 58–60; Tr. 808–810).

As its words make clear, the Court was not questioning the continued vitality of the *Roth* charge, but rather the *Ginzburg* trial court's "exegesis" of that charge.[13] The trial court's opinion in *Ginzburg* emphasized that children, psychotics, the feeble minded and other susceptible elements were part of the community. In so emphasizing the most "susceptible" elements, the opinion lacked the balance and neutrality of the *Roth* standard, which properly gave equal emphasis to contrasting elements of society's spectrum in defining "the community as a whole."

Subsequent to *Ginzburg*, the *Roth* charge, in substantially the same form given in this case, was upheld. *United States* v. *Manarite*, 448 F. 2d 583 (C.A. 2), certiorari denied, 404 U.S. 947. As the court said (448 F. 2d at 592):

> It makes it clear that the community as a whole is to be considered in determining what its standards are. It does not put any undue emphasis on the fact that children are part of this community.

The mention of children in the charge here is not inconsistent with *Butler* v *Michigan*, 352 U.S. 380. That case involved the validity of a Michigan statute condemning the distribution to anyone of books tend-

[13] The United States Court of Appeals for the Second Circuit misinterpreted the *Ginzburg* footnote in *United States* v. *Manarite*, 448 F. 2d 583, certiorari denied, 404 U.S. 947. *Manarite* attributed the language in the opinion of the district court in *Ginzburg* to the *Roth* case, and thereby construed the *Ginzburg* footnote as questioning the correctness of the *Roth* definition of community standards. However, the *Ginzburg* footnote, properly read, does not question the *Roth* charge.

ing to corrupt the morals of minors, a law that thus "reduce[d] the adult population of Michigan to reading only what is fit for children" (*id.* at 383–384). The charge in this case, however, did not instruct the jury to apply such a standard. On the contrary, it explicitly emphasized the standards of the average person in the community as a whole.

Although the court of appeals found no reversible error in the trial court's reliance on the *Roth* instruction, it stated that "inclusion of children is unnecessary in the definition of the community" and that children should be excluded from future instructions until this Court determines otherwise (Pet. App. 5a–6a). In this case, however, the instructions as a whole eliminated any possibility that the jury might give undue weight to the impact of the material upon children. Although the better practice is for trial judges not to refer to children at all in defining the community, to avoid the possibility that less carefully framed instructions may mislead the jury (cf. *Ginzburg* v. *United States, supra*, 383 U.S. at 465, n. 3), the instructions here, taken as a whole, avoided that danger and were correct.

II. THE RECORD CONTAINED EVIDENCE PERMITTING THE DISTRICT COURT TO INSTRUCT THE JURY THAT IT COULD FIND THE MATERIAL OBSCENE IF IT APPEALED TO THE PRURIENT INTEREST IN SEX OF MEMBERS OF A DEVIANT SEXUAL GROUP

The district court charged that the jury should consider (A. 56–57; Tr. 806):

> [W]hether the predominant theme or purpose * * * is an appeal to the prurient interest of

> the average person of the community as a whole or the prurient interest of members of a deviant sexual group at the time of the mailing.

Petitioner contends (Br. 39–45) that the government's proof did not justify a "deviant group" instruction. This contention is unsound.

In cases since *Roth,* the Court has "regarded the materials as sufficient in themselves for the determination of the question" of obscenity. *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 56, quoting from *Ginzburg* v. *United States,* 383 U.S. 463, 465. See also *Jenkins* v. *Georgia,* 418 U.S. 153, 159–160; *Hamling* v. *United States, supra,* 418 U.S. at 100; *Kaplan* v. *California,* 413 U.S. 115, 120–121. It is also settled that "[a] juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination * * *." *Hamling* v. *United States, supra,* 418 U.S. at 104. Materials that are directed at the prurient interest of members of deviant sexual groups, however, are assumed to have little or no appeal to the average or normal person.

The Court dealt with such materials in *Mishkin* v. *New York,* 383 U.S. 502, 505,[14] That case involved fifty books which "* * * portray[ed] sexuality in

[14] The Court first considered deviant pornography in *Manual Enterprises* v. *Day,* 370 U.S. 478. The materials there were "composed primarily * * * for homosexuals" and "* * * would appeal to the 'prurient interest' of such sexual deviates, but would not have any interest for sexually normal individuals * * *." The Court had granted review to define "the relevant 'audience' in terms of which * * * 'prurient interest' appeal should be judged." 370 U.S. at 481–482 (opinion of Mr. Justice Harlan). The court of appeals

many guises. Some depict[ed] relatively normal heterosexual relations, but more depict[ed] such deviations as sado-masochism, fetishism, and homosexuality." Mishkin argued that these books did not "satisfy the prurient-appeal requirement because they [did] not appeal to a prurient interest of the 'average person' in sex, that 'instead of stimulating the erotic, they disgust and sicken.' " *Id.* at 508. The Court "reject[ed] this argument as being founded on an unrealistic interpretation of the prurient-appeal requirement," and held (*ibid.*):

> Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.

Mishkin thus "adjusted the prurient appeal requirement to social realities" (383 U.S. at 508–509); materials could be obscene if they appealed to the prurient interest of the "average person" in the community or, alternatively, to members of a "clearly defined deviant sexual group." See *Smith* v. *United States, supra,* 431 U.S. at 300 n. 6.

in *Manual Enterprises* had refused to apply the *Roth* "average person" test to materials that catered to homosexuals and instead "held that the administrative finding respecting their impact on the 'average homosexual' sufficed to establish the Government's case as to their obscenity." *Ibid.* After examining the materials, this Court found that they were not obscene for the different reason that they were not patently offensive. Accordingly, the Court did not reach the relevant audience question.

The Court further clarified this relevant audience standard in *Hamling* v. *United States, supra,* 418 U.S. at 127–130. There a government expert witness testified that the brochure in question "appealed to the prurient interest of various deviant sexual groups" (*id.* at 127).[15] The Court held that such evidence was admissible under *Mishkin, supra,* since "each of the pictures said to appeal to deviant groups did in fact appear in the brochure * * * [and] it was 'manifest that the District Court considered that some of the portrayals in the Brochure might be found to have a prurient appeal' to a deviant group. 481 F. 2d [307,] 321 [C.A. 9]." *Hamling* v. *United States, supra,* 418 U.S. at 128–129.

Under these criteria, there was ample evidence to support a "deviant group" instruction. The third page of each four page brochure was devoted to publications concerning male homosexual sex. That page generally was entitled "Male Or[illegible]" or "Male Bag," making clear the deviant group [illegible]hich it was aimed (see, *e.g.,* G. Exs. 1B, 4A, 8A). Similarly, page four of each brochure advertised bondage and other sado-masochistic materials.[16]

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[15] Specifically, he testified that the materials appealed to "homosexuals, group sexual activists and persons in masochism, pedophilia and zoophilia." *United States* v. *Hamling*, 481 F. 2d 307, 321 (C.A. 9).

[16] In *Ward* v. *Illinois*, 431 U.S. 767, 773, this Court held that sadomasochistic materials may be constitutionally proscribed although not "expressly included within the examples of the kinds of sexually explicit representations" that *Miller* v. *California*, 413 U.S. 15, 24, listed as patently offensive.

Besides their blatant appeal to such deviant sexuality, the brochures also advertised materials on bestiality (G. Exs. 4A, 5A, 6A, 7E, 9E), pedophilia (G. Exs. 8A, 9B), lesbianism (G. Exs. 1B, 2A, 3A, 7B), device sex (G. Exs. 7G, 11B) and group sex (G. Exs. 1B, 7A, 8A, 9B). Most of the brochures integrated advertisements of heterosexual sex, which would appeal to the prurient interest of the average person, with advertisements directed toward one or more deviant groups.

The fact that the mailings were aimed not only at that average person but also at specific deviant groups is further demonstrated by the inclusion in one mailing of a sheet of paper requesting that the recipient identify the particular types of materials—"novelties," "fetish," "gay," or "hetero"—that he was interested in receiving in the future. (See note 3, *supra,* p. 4.)

"Materials such as these, which by title or content may fairly be described as sado-masochistic" (*Ward* v. *Illinois,* 431 U.S. 767, 771), come under the *Mishkin* test. In *Ward,* the evidence consisted solely of the two publications—"Bizarre World" and "Illustrated Case Histories, a Study of Sado-Masochism"—and the testimony of the policeman who purchased them * * *". *Id.* at 770. Similarly, in this case the materials themselves established a sufficient evidentiary foundation for the instruction.

As the Court noted in another obscenity case, "the materials themselves * * * are the best evidence of

what they represent."[17] *Paris Adult Theatre I, supra,* 413 U.S. at 56. Obscenity "is not a subject that lends itself to the traditional use of expert testimony." *Id.* at 56 n. 6. Experts in this field traditionally differ.[18] Confronted with conflicting opinions, a jury will inevitably turn to the materials themselves.

Although the defense may have a right to attempt to persuade the jury that certain materials are not obscene by presenting experts (see *Smith* v. *California,* 361 U.S. 147, 164–165, 171 (Harlan, J., and Frankfurter, J., concurring)), the jury is not bound to accept the expert's opinion. This is both a realistic and sound approach: the jurors, who are members of the relevant community, have as good sense of the level of tolerance and acceptance of sexually-explicit materials in that community as any expert. See *United States* v. *Groner,* 479 F. 2d 577, 585 (C.A. 5) (*en banc*), certiorari denied, 419 U.S. 1010.

In any event, contrary to petitioner's assertion (Br. 41), the government did present additional evidence on this issue. Dr. James Rue (see *supra,* p. 9), an expert in marriage and family and child counselling,[19] testified as to various deviant sexual practices—group sex, homosexuality, sex with animals, artificial devices, sadomasochism and sadobondage—and concluded that these materials appealed "to the prurient interest of * * * deviant particular groups" (A. 33–37, 41; Tr. 571–578, 588–589). For example, Dr. Rue testified (A. 37; Tr. 577–578) that:

> group sex, which is so predominant in this material would again suggest that they are striving as best they know how to appeal to the unnatural, to the unwholesome side of sex, which would have particular interest, particularly to deviate groups, the homosexual one being obvious.

When asked to whom the film "Dirty Old Man" (which was advertised with a photograph of a teenage

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[17] See *United States* v. *Groner,* 479 F. 2d 577, 587 (C.A. 5) (*en banc*) (Ainsworth, J., concurring), vacated and remanded, 414 U.S. 969, on remand, 494 F. 2d 499, certiorari denied, 419 U.S. 1010: "Expert testimony to provide information to the fact finder may be helpful in obscenity cases but is not indispensable. At times it may confuse more than help. A swearing contest between opposing literary or social experts may well turn a case involving criminal sanctions pertaining to obscenity into a farce. This is not to say that such testimony may not be received by the trier of fact, but only that it should not be required. The juror, as the so-called reasonable man or average man, can determine as well as most experts whether the involved material is obscene within the definition of *Roth* and its progeny. It is no more difficult for the fact finder to make such a determination than it is to apply such elusive concepts as negligence and proximate cause or in the area of antitrust such broad phrases as 'restraint of trade' and 'every contract, combination * * * or conspiracy.'"

See *United States* v. *Palladino,* 490 F. 2d 499 (C.A. 1), where the court of appeals left to the district court the decision whether expert testimony should be required on prurient appeal to deviant groups.

[18] The present case well illustrates the truth of this assertion. Petitioner introduced two witnesses who testified that nothing, save perhaps necrophilia and sadomasochism, would appeal to prurient interest (Tr. 431–432, 501–502). On the other hand, the government's rebuttal witness, Dr. Rue, testified that the materials appealed to the prurient interest of the average person as well as to deviate sexual groups (A. 41; Tr. 588–589).

[19] Petitioner objected to Dr. Rue's testimony relating to the appeal of the materials to deviant sexual groups (A. 32; Tr. 552–553). But both Dr. Ward and Rev. McIlvenna, petitioner's

girl committing fellatio) appealed, Dr. Rue responded (A. 39–40; Tr. 580–581):

> I think to a deviate [sic] group that might be described as a sociopathic type of person, which we could call a character disorder.

Dr. Rue also testified that the picture of a female engaged in intercourse with a dog would appeal to the prurient interest of a sexually deviant group (A. 41; Tr. 582–583).

Dr. Rue's testimony constituted additional evidence that the materials in this case appealed to the prurient interest of "clearly defined deviant sexual group[s]." *Mishkin* v. *New York, supra,* 383 U.S. at 508.[20]

III. THE EVIDENCE JUSTIFIED THE INSTRUCTION ON PANDERING

The district court instructed the jury that (A. 59–60; Tr. 810–811):

> In making [the determination of obscenity under the *Roth-Memoirs* standard] you are not

experts, testified that the materials would not appeal to the prurient interest of homosexuals and other deviant sexual groups (Tr. 389–390, 500–504). Therefore, Dr. Rue's testimony was proper rebuttal.

[20] In addition, petitioner's expert witnesses gave evidence relevant to the question of deviant appeal. Reverend McIlvenna and Dr. Ward testified that sadomasochistic materials and necrophilia would appeal to a prurient interest in sex (Tr. 431–432). They also listed as deviant sexual groups zoophiliacs, necrophiliacs, sadomasochists, and homosexuals, but testified that these materials did not appeal to the prurient interest of those groups (Tr. 387–388, 499, 501–503). From McIlvenna's testimony, the jury could have concluded that parts of the brochures appealed to the prurient interest of sadomasochists. The jury could also have used petitioner's composite list of deviant groups in determining those to whom each photograph might appeal (G. Ex. 11C).

> limited to the materials themselves. In addition, you may consider the setting in which they are presented. Examples of what you may consider in this regard are such things as: manner of distribution, circumstances of production, sale and advertising. The editorial intent is also relevant. What you are determining here is whether the materials were produced and sold as stock in trade of the business of pandering. Pandering is the business of purveying textual or graphic matter openly advertised to appeal to erotic interest of the customer.
>
> The question of obscenity is to be answered by application of the basic test recited earlier, but if you find this to be a close case under that test, then you may consider the evidence of pandering to assist you in your decision. Such evidence is pertinent to all three elements of the basic test of obscenity.

Pandering is "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." *Ginzburg* v. *United States,* 383 U.S. 463, 467; *Roth* v. *United States, supra,* 354 U.S. at 495–496 (Chief Justice Warren, concurring). "There is no doubt that as a matter of First Amendment obscenity law, evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene." *Splawn* v. *California,* 431 U.S. 595, 598.[21] Contrary to petitioner's

[21] Petitioner's suggestion (Br. 46–47 n. 7) that *Ginzburg* was overruled by *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, was thus rejected in *Splawn* v. *California*, 431 U.S. 595.

contention (Br. 45–47), the evidence in the present case warranted an instruction on pandering.

The evidence showed, in essence, that petitioner was in the business of purveying books, magazines and films, such as the film "613" and the magazine "Bedplay," which he openly advertised to appeal to the particular "erotic interest" of his customers. For example, petitioner advertised film "613" in a four page brochure with a picture showing unnatural sex acts (G. Exs. 8A, 9B). No textual description of the film accompanied the photograph. This same brochure contained numerous advertisements for other films and magazines. Each advertisement contained one sexually explicit photograph and the title of the film or magazine. The four page brochure concluded with a clip out order form to be used in purchasing the advertised materials. In short, petitioner's "sole emphasis [was] on the sexually provocative aspects." *Memoirs* v. *Massachusetts,* 383 U.S. 413, 420; *Ginzburg* v. *United States, supra,* 383 U.S. at 470.

Similarly, the magazine "Bedplay" was advertised in a four page, black and white brochure devoted to advertising various sex films and magazines with photographs focusing on genitalia (G. Exs. 1B, 2A, 3A, 7B). The brochure contains a minimum of words, and those words that do appear were manifestly included "for titillation, not for saving intellectual content." [22]

[22] See, *e.g.*, the advertisement for the film "Mustachioed Magic" (G. Ex. 1B): "No Mr. America, but equal in stamina and stamen. His honey blond sex partner really stirs him up in the process and we are sure you will be too."

Ginzburg v. *United States, supra,* 383 U.S. at 470. This is graphically shown by the advertisement for the magazine "Bedplay," which contained on its cover only an erotic picture and no accompanying text.

The "leer of the sensualist" (*Ginzburg, supra,* 383 U.S. at 468) also permeates the remaining brochures, which depict a variety of pornographic scenes.

In sum, all of the advertised publications and films (each exorbitantly priced [23]) were "commercial exploitation of erotica * * *" and the brochures focused directly on their "prurient appeal." *Ginzburg* v. *United States, supra,* 383 U.S. at 466. Even a cursory examination of their content refutes petitioner's claim that there was a "paucity of evidence" on this issue (Br. 48). On the contrary, "Bedplay" and "613" were the "stock in trade" of petitioner's business of pandering. 383 U.S. at 467.

Moreover, as in *Ginzburg* v. *United States, supra,* 383 U.S. at 469–470, "[t]he solicitation was indiscriminate, not limited to those, such as physicians or psychiatrists, who might independently discern the book's therapeutic worth." The recipients in this case included a college student, a retired person, a housewife, a retail florist, an Episcopalian minister and a police lieutenant. At least one mailing was unsolicited. It contained a piece of paper informing the

[23] The price printed on "Bedplay" is $10.00 although the brochure advertised it for $7.50 (G. Exs. 1B, 7A). The film "613" was offered for $20.00 in black and white and $35.00 in color (G. Exs. 8A, 9B).

recipient that his name had been purchased from another mail order house and asked him to indicate which type of materials ("novelties, fetish, gay or hetero") he was interested in receiving (G. Ex. 11C). The recipients lived throughout the United States, and in each mailing petitioner included a return envelope with his business address. Petitioner stipulated that he "voluntarily and intentionally" mailed these brochures (A. 13–18; Tr. 134–141).

Petitioner's contention that this evidence was insufficient to support a pandering charge is based upon his mistaken belief that elaborate evidence of a defendant's editorial goals, practices, methods of operations and distribution is required. Such matters go to the weight and persuasiveness of the evidence, not to the threshold showing that justifies a pandering instruction. The materials here had no purpose other than to pander to a prurient interest, and petitioner—who concedes the "tawdry setting of this case (Br. 53)—makes no suggestion that the material could have had any other purpose.[24]

[24] Neither *Manual Enterprises* v. *Day*, 370 U.S. 478, 491, nor *Papish* v. *Board of Curators*, 410 U.S. 667, 670, n. 6, is to the contrary. Those cases did not involve advertising brochures containing hard core pornography and plainly offering more. Compare *United States* v. *Baranov*, 418 F. 2d 1051, 1053 (C.A. 9), and *Ginzburg* v. *United States*, *supra*, 383 U.S. at 465, in which it was assumed that apart from the context of the advertising, the materials were not obscene.

Equally inapplicable is *United States* v. *Pellegrino*, 467 F. 2d 41 (C.A. 9), which, as the court of appeals noted (Pet. App. 9a–10a), involved material containing "chaste and self-serving disclaimers of obscene theme which were not transparently spurious."

In any event, the district court's charge, which closely resembled the instruction approved in *Hamling* v. *United States*, *supra*, 418 U.S. at 130–131, left to the jury the determination whether the advertisement pandered to prurient interests and whether that fact showed that the materials were obscene. Contrary to petitioner's contention (Br. 50–52), the jury was invited to consider evidence that was well within the threshold for a pandering instruction, rather than matters not in evidence.

Because the brochures here "proclaimed its obscenity," *Ginzburg* v. *United States*, *supra*, 383 U.S. at 472, the two courts below correctly found (Tr. 738; Pet. App. 10a) that the instruction on pandering was justified. See *United States* v. *Dachsteiner*, 516 F. 2d 20, 22–23 (C.A. 9); *United States* v. *Wasserman*, 504 F. 2d 1012, 1016 (C.A. 5); *United States* v. *Ratner*, 502 F. 2d 1300, 1301–1302 n. 2 (C.A. 5), certiorari denied, 423 U.S. 898. In light of this evidence, the closing remarks of government counsel on this issue to the jury were not indiscriminate nor did they improperly open the "floodgates" (Br. 49). They simply underscored what the evidence showed (Tr. 731–734).

IV. THE DISTRICT COURT PROPERLY EXCLUDED TWO FILMS, "DEEP THROAT" AND "THE DEVIL IN MISS JONES," AS COMPARISON EVIDENCE

Petitioner contends (Br. 33, 38) that the district court erroneously excluded two films, "Deep Throat" and "The Devil in Miss Jones," as comparison evidence.[25]

In arguing that the materials in the present case are not obscene under community standards (A. 19–21; Tr. 170–172), petitioner contended that the financial success of two films, "Deep Throat" and "The Devil in Miss Jones," in Los Angeles (A. 21–27; Tr. 283–300) demonstrated that the relevant community tolerates the kind of material petitioner purveys. When the district court asked petitioner how these two films could compare to the still photographs in the printed materials and the film "613," none of which had a plot or any other characteristics of the

[25] The court of appeals held that the comparison evidence issue applied only to Count 9, which charged petitioner with mailing an obscene film, "613." Under the concurrent sentence doctrine, however, it declined to decide whether petitioner had shown a degree of community acceptance sufficient to warrant admission of the films as comparison evidence (Pet. App. 12a–14a). In our brief in opposition to the petition for a writ of certiorari, we urged (p. 10) that this ruling was correct. We erred. Petitioner was sentenced to concurrent terms of imprisonment on each of eleven counts and separate $500 fines on each count. The judgment shows that the fines are cumulative. Since petitioner has a monetary interest in reversing his conviction on any single count, the concurrent sentence doctrine is inapplicable here. *United States* v. *Allen*, 554 F. 2d 398, 407 n. 15 (C.A. 10), certiorari denied, No. 76–1851, October 3, 1977. Cf. *Jeffers* v. *United States*, No. 75–1805, decided June 16, 1977, slip op. 18–20. In the interest of judicial economy,

two films, petitioner replied that he intended to offer "the comparison only in terms of candor, not in comparison of theatrical beauty or excellence." The court replied, "I don't see that there is a basis for me to accept your offer as comparable evidence, or to allow this jury to view those pictures. And I will have to reject your proposal" (A. 20; Tr. 171–172).[26]

The court later viewed a portion of "Deep Throat," but again ruled that the jury should not view the films (A. 41–42; Tr. 693). Nevertheless, the court permitted petitioner to introduce evidence that, based on gross receipts, "Deep Throat" and "The Devil in Miss Jones" were respectively the first and third largest money making films in Los Angeles in 1973 (A. 21–27; Tr. 300–301). In addition, one of petitioner's expert witnesses, Dr. Ward, testified that "613" was equal in sexual explicitness to "Deep Throat" (Tr. 385–386).

The court of appeals viewed both films and compared them with all the other exhibits. It determined that "for the films to be admissible as comparable and probative of community standards the burden is on the defendant to demonstrate two prerequisites: (1) a reasonable resemblance between the proffered comparables and the allegedly obscene materials, and (2)

however, we submit that instead of remanding the case to the court of appeals for further consideration of the comparative evidence question, this Court should decide the issue.

[26] Petitioner offered to take the jury to a movie theatre to view the two films in their 35 mm. version with soundtrack as shown to the public. Alternatively, petitioner offered to exhibit 8 mm. silent, edited versions in the courtroom (A. 31; Tr. 539–542).

a reasonable degree of community acceptance of the proffered comparables" (Pet. App. 13a). Petitioner does not challenge this standard, which was first set forth in *United States* v. *Jacobs*, 433 F. 2d 932, 933 (C.A. 9); accord, *United States* v. *Womack*, 509 F. 2d 368, 377–378 (C.A. D.C.), certiorari denied, 422 U.S. 1022.

The court of appeals concluded that none of the advertising materials was comparable to the two films, because they (1) were of a different medium and (2) did not portray the homosexual and sadomasochistic materials advertised in the brochures. It ruled, however, that the two films "bore a reasonable resemblance to the film 'No. 613,'" involved in Count 9, because all three films presented the same or similar sexual acts with an equal degree of explicitness (Pet. App. 13a).

We submit that none of the materials met either element of the test for admissibility of comparable materials and that the district court did not abuse its broad discretion to determine "the illuminating relevance of testimony" in an obscenity trial in refusing to permit the jury to view the films. *Hamling* v. *United States, supra,* 418 U.S. at 124–125.

A. The advertising brochures on their face were substantially different in format and expression from the two comparison films. That all may have involved explicit depiction of sexual activity is not enough to establish comparability, for all depictions of "sex and obscenity are not synonymous" (*Roth* v. *United States,* 354 U.S. 476, 487).

Explicit depiction in one form and context is not necessarily the same in purpose and effect as such depiction in another. As the court of appeals noted (Pet. App. 13a), "'slight variations in format' may produce 'vastly different consequences in obscenity determinations.'" *United States* v. *Womack, supra,* 509 F. 2d at 378. The comparison films contain music, dialogue, purported humor, structured cinematic directions, and a plot. They were displayed to the public on 35 mm. color film in a motion picture theatre and were intended as entertainment. In contrast, petitioner's brochures presented black and white photographs with no story development or text. "Bedplay" magazine similarly was nothing more than a collection of hard-core pornographic pictures.

Save for explicit sexual description, the two films also lacked a reasonable resemblance to petitioner's film "613." The latter was a black and white 8 mm. film of poor quality with no soundtrack, dialogue, subtitles, or plot, edited to emphasize only sexual episodes.

B. In any event, petitioner's evidence did not show significant community acceptance of the two films and thus did not satisfy the second element of the test for comparison evidence in obscenity cases. Success at the box office is not necessarily a measure of community acceptance. Box office receipts indicate only the number of people who, out of curiosity or otherwise, attended the showing of a film; they do not indicate the reactions of the movie-

goers as they departed the theatre. Nor does it follow that because "Deep Throat" attracted a large audience in Los Angeles, the average person in the community would not find the film obscene.[27] As the Court noted in *Hamling* v. *United States, supra,* 418 U.S. at 126, quoting from *United States* v. *Manarite, supra,* 448 F. 2d at 583:

> Mere availability of similar material by itself means nothing more than that other persons are engaged in similar activities.

Moreover, petitioner's sampling of the Central District of California (where this case was tried) was incomplete: it did not account for the views of the large number of adults in the seven counties of the district[28] who did not attend the film or for the likelihood that many ticket-buyers were tourists, conventioneers, or repeat viewers from outside the district. Petitioner showed only that these films were financially successful in Los Angeles.

In addition, the substantial receipts the two films generated may indicate only a lack of effective prosecution or a decision to employ enforcement re-

[27] The First Circuit in *United States* v. *One Reel of Film*, 481 F. 2d 206, 208, described "Deep Throat" as containing "scenes of explicit heterosexual intercourse, including group sex, and emphasiz[ing] various scenes of explicit penetration, fellatio, cunnilingus, female masturbation, anal sodomy and seminal ejaculation."

[28] The Central District of California contains seven counties: San Luis Obispo, Ventura, Santa Barbara, San Bernardino, Riverside, Los Angeles and Orange (A. 58; Tr. 808). In 1970, these counties had a combined population of 6,374,471 persons over 21. Bureau of the Census, 1970 Census of Population, Charcteristics of Population for California.

sources elsewhere, not community acceptance of their explicit sexual material. Cf. *Smith* v. *United States, supra,* 431 U.S. at 306. Even "[a] judicial determination that particular matters are not obscene does not necessarily make them relevant to the determination of the obscenity of other materials, much less mandate their admission into evidence." *Hamling* v. *United States, supra,* 418 U.S. at 126–127.

"Deep Throat" has been found to be obscene in prosecutions in other parts of the country.[29] Such determinations, of course, are not dispositive in the Central District of California, any more than the opposite determination would be. But they indicate that the introduction of such materials may invite

[29] *United States* v. *Marks*, 520 F. 2d 913 (C.A. 6) (under *Miller*), reversed, *Marks* v. *United States*, 430 U.S. 188 (improper standard applied), convicted on retrial, E.D. Ky., No. 11,057, September 9, 1977, (under *Memoirs*), appeal pending, C.A. 6, No. 77–5382; *United States* v. *One Reel of Film*, 481 F. 2d 206, 208–209 (C.A. 1), affirming 360 F. Supp. 1067 (D. Mass.) (film obscene under *Miller* and *Memoirs*); *Sanders* v. *State*, 234 Ga. 586, 216 S.E. 2d 838 (film obscene, no standard enunciated); *People* v. *Mature Enterprises, Inc.*, 352 N.Y.S. 2d 346, 76 Misc. 2d 660 (film obscene under *Miller*); *Mangum* v. *Maryland State Board of Censors*, 273 Md. 176, 328 A. 2d 283 (film obscene under *Miller*, probably obscene under *Memoirs*); *State* v. *American Theater Corp.*, 194 Neb. 84, 230 N.W. 2d 209 (film obscene under *Miller* and *Memoirs*); *State ex rel Cahalan* v. *Diversified Theatrical Corp.*, 59 Mich. App. 223, 229 N.W. 2d 389 (film obscene under *Miller*).

Prosecutions for the showing of "Deep Throat" resulted in acquittals in Los Angeles County, Orange County and San Bernardino County. In obscenity cases "different juries might reach different conclusions as to the same material." *Smith* v. *United States, supra,* 431 U.S. at 309; *Hamling* v. *United States, supra,* 418 U.S. at 101; *Miller* v. *California, supra,* 413 U.S. at 26, n. 9; *Roth* v. *United States, supra,* 354 U.S. at 492, n. 30. Cf. *Dunlop* v. *United States*, 165 U.S. 486, 499–500.

the jury to speculate on the obscenity *vel non* of the comparison films themselves and may thus "tend to create more confusion than enlightenment * * *" (*Hamling* v. *United States, supra,* 418 U.S. at 127) and "make the trial unmanageably complex and lengthy." *United States* v. *Womack, supra,* 509 F. 2d at 378.

The district court has broad discretion in determining the admissibility of comparison evidence in obscenity cases. The court did not here abuse its discretion in concluding that requiring the jury to view and consider the two films, solely because they contained similar scenes of explicit sex and had enjoyed commercial success, would not have advanced the jury's deliberations.

The court did not, however, by excluding the films, preclude petitioner from introducing appropriate evidence relevant to community standards. See *Smith* v. *California, supra,* 361 U.S. at 164 (Frankfurter, J., concurring). Petitioner presented five witnesses who testified concerning community standards. Two of those witnesses, Gayle Essary and Roderick Bell, gave the results of a survey they had taken in certain areas of the Central District of California on community acceptance of explicit sexual conduct in movies. Dr. Ward and Reverend McIlvenna testified that the materials at issue would not appeal to the prurient interest of the average person in the community. Petitioner's difficulty is that the jury rejected this evidence, as it had the right to do.[20]

[20] If the Court agrees with our contention that the two comparison films were properly excluded with respect to the obscenity

In sum, this is not an easy case. As the court of appeals observed, and as we agree, certain aspects of the district court's instructions were unnecessary and it would have been the better practice not to have included them. Nevertheless, in light of the unmistakable nature of the materials, which plainly are outside the protections of the First Amendment, the manner in which they were purveyed, and the instructions when viewed as a whole, the court of appeals correctly concluded that the trial judge's charge to the jury did not constitute reversible error.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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of petitioner's advertising materials, then the comparison issue will have been resolved with respect to all counts of the indictment save Count 8, which charged petitioner with mailing "an advertisement giving information where, how, from whom, and by what means an obscene film described as No. '613' could be obtained" (A. 6). Count 9, which charged petitioner with mailing an "obscene movie film identified as No. '613' and obscene illustrated brochures advertising sex films, books and magazines" (A. 7) should not be reversed, because one of the obscene brochures, "Canned Heat" (G. Ex. 9E), was also determined to be obscene by the jury in Counts 4, 5, and 6 (see G. Exs. 4A, 5A, and 6A).

U.S. GOVERNMENT PRINTING OFFICE: 1978

Supreme Court of the United States

October Term, 1977

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Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. THE DISTRICT COURT IMPROPERLY CHARGED THE JURY TO INCLUDE CHILDREN AND SENSITIVE PERSONS AS A PART OF THE COMMUNITY WHOSE STANDARD WAS TO BE APPLIED.

A. The Propriety of Inclusion of Children and Sensitive Persons in the Community Was Not Decided in Roth.

Respondent answers the first two questions presented by petitioner by arguing that the district court's charge to the jury that it include children and sensitive persons in the community whose standards were to be applied com-

ported with the instruction which this Court "expressly approved" (Resp. Br. 18) in *Roth v. United States*, 354 U.S. 476 (1957), and that in any event, when viewed in the context of the overall charge and the record the objectionable portions of the charge fade away.

Petitioner has shown in his opening brief (Pet. Br. 17-19) that neither the charge in *Roth*, nor certainly the propriety of an instruction to include children and sensitive persons as a part of the community, were under review in *Roth*. The disavowal of such review was expressly stated by Justice Harlan, *Roth v. United States*, *supra*, 354 U.S. at 507, fn. 8, and non-approval was later noted by Justice Brennan in *Ginzburg v. United States*, 383 U.S. 463, 465, fn. 3 (1966). Moreover, the court below expressed the view that children should not be included in the community "until the Supreme Court clearly indicates that inclusion is proper." *United States v. Pinkus*, 551 F.2d 1155, 1158 (Pet. App. 6a).

B. The Errors Were Not Cured by Consideration of the Entire Charge and the Trial Itself.

The district court instructed the jury on the *Roth-Memoirs* standard of obscenity (App. 55). After defining "obscene" to the jury, the trial court instructed the jury as to the procedure to be used by it in determining whether the materials before it were obscene. The Court instructed the jury that "current standards of the community" (*Ibid.*) were to be applied. To guide them in assessing those standards, the Court instructed the jury that it "must include the sensitive" (App. 57) and "to consider . . . children." (App. 58). The instruction was given over objection of petitioner (R.T. 641-643, 654-655, 659), whose offered instruction was rejected by the trial court (C.T. 191; R.T. 661-662, 672).

Respondent candidly concedes that it would have been "better practice" for the trial court "not to refer to children at all in defining community" (Resp. Br. 27), but urges nevertheless that the instructions taken as a whole were correct, particularly in view of the trial court's frequent references to the "average person". Respondent does not explain how the jury could reconcile an instruction relating to an "average person" in the community, when at the same time it was directed that it "must include" sensitive persons and children in arriving at the appropriate community, and be deemed to have in fact applied a community standard test of the appeal of the material in issue to the average person. It will be recalled that the jury received evidence on the effect of obscenity on children (R.T. 396-397; App. 38), and heard one prosecution witness describe a case in which a child had been molested by her father after he had visited an adult book store (App. 38).

Respondent relies on *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973); *United States v. Park*, 421 U.S. 658, 674-675 (1975); and *Hamling v. United States*, 418 U.S. 87, 107-108 (1974), for the proposition that the overall charge and the trial itself serve as a curative for specific deficiencies in the court's jury instructions.

The overall charge rule had its genesis in *Boyd v. United States*, 271 U.S. 104 (1926), which was cited by the court below as well as by this Court in *Cupp v. Naughten*, *supra*; *United States v. Park*, *supra*; and *Hamling v. United States*, *supra*. In *Boyd*, a part of the jury instructions was found to be ambiguous and even erroneous if given one possible interpretation. The conviction was nevertheless affirmed on a determination that upon consideration of the instructions as a whole, the jury was capable of resolving the ambiguity without prejudice to the defendant. Central to the Court's determination of

the issue was the fact that defendant had made no objection to the portion of the charge which he attacked on appeal.

In *Cupp v. Naughten, supra,* other considerations led to the application of the overall charge rule. In the state prosecution, in which the defendant did not testify, the jury was charged that every witness was presumed to speak the truth. The defendant instituted federal habeas corpus after the state courts rejected his contention that the instruction operated to shift the state's burden of proof and required that he prove his innocence. This Court determined that the questioned instruction did not deny defendant due process because there were contained in the entire charge specific instructions on the presumption of defendant's innocence and the state's burden to prove him guilty beyond a reasonable doubt, neither of which was found to have been affected by the instruction on the presumption of truthfulness.

This Court acknowledged in *Cupp* that many federal circuit courts had condemned the presumption of truthfulness charge, but nonetheless was not persuaded that the defendant's writ be granted. The Court reasoned that since the error in the challenged instruction *was not of constitutional dimension,* and inasmuch as the Oregon Court of Appeals had reviewed the charge and upheld the specific instruction upon the authority of a prior decision of the Oregon Supreme Court, the state determination would be followed. This Court made clear that its ultimate determination of the issue would not necessarily have been the same had the issue arisen in a federal prosecution, in which event it would have been permitted to exercise its supervisory jurisdiction in determining the propriety of the jury instruction. In the case at bar, this Court is reviewing a federal prosecution and has been called upon to exercise both its appellate and supervisory jurisdiction in reviewing the instructions here in issue.

The jurisdictional bar found to be operative in *Cupp v. Naughten* does not impede decision on the issues by this Court. See also, *Splawn v. California*, 431 U.S. 595, 599 (1977).

In *United States v. Park, supra,* defendant, the president of a large food chain, was convicted of violating the Federal Food, Drug and Cosmetic Act, by having caused shipments of adulterated foods. The trial court charged the jury, *inter alia,* that to convict the defendant it must find that the defendant, as president and chief executive officer of the company, had a "responsible relationship to the issue" and "in the situation out of which these charges arose." 421 U.S. at 665, fn. 9. On appeal, defendant urged that the trial court's instruction failed to define "responsible relationship". Although defendant had objected to this aspect of the charge, he had not offered the trial court a definition for its use in charging the jury. This Court held that upon consideration of the entire charge and in the context of the trial itself, the "jury could not have failed to be aware" of the main issue for determination. 421 U.S. at 675. The Court finally noted that the defendant had not offered a curative instruction and, in view of the evidence which had been presented, the trial court was under no compulsion *sua sponte* to provide such instruction. Unlike the facts in *Park,* however, the record of proceedings in this case reveals that petitioner literally implored the trial court not only to refrain from charging on children and sensitive persons, but also offered instructions which either would have expressly excluded children from the jury's consideration or limited such consideration to a community comprised of adult persons. These instructions were refused.

Nor can it be fairly stated that the jury could not have been affected by the inclusion of children and sensitive persons in its composition of the community, espe-

cially in view of the fact that it had received evidence relating to the effect of obscene materials on children.

The government's further reliance on *Hamling v. United States, supra,* in this regard, is inapposite. In *Hamling,* this Court did state that jury instructions are to be judged as a whole and held, *on the facts of that case,* that "only where there is a probability that excision of the references [complained of as error] . . . would have affected the deliberations of the jury" would reversal be required. *Id.,* at 107-108. But that standard was employed only because of the "unusual posture of [that] case" in which "the challenged instruction was proper at the time it was given by the district court" but petitioners on appeal sought "the benefit of a change in the law which casts doubt on the correctness of portions of it." *Id.,* at 108. No such circumstances exist in the instant case; accordingly, it is governed by the general standard of prejudicial error enunciated in *Kotteakos v. United States,* 328 U.S. 750, 765 (1946) by Justice Rutledge:

> "[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.,* 328 U.S. at 765.

The errors in the trial court's charge to the jury here complained of constituted affirmative mis-instruction on the law which it was to apply. That law was of constitutional dimension for it was intended to instruct the jury on an essential element in the law of obscenity which

they were to apply in determining whether the materials were protected or unprotected speech. These defective instructions were not merely ambiguous statements which the jury could be said to have safely resolved. Rather, the jury is presumed to have followed the court's instruction and did exactly what it was told to do—apply a community standard which includes children and sensitive persons. Moreover, unlike the cases upon which the government relies, the jury instructions as a whole in this case did nothing to dilute or explain the error of the trial court's instruction to include children in the composite of the community. Limitations in the balance of the jury instructions to the community as a whole, rather than to a particular segment of it, did not in any way mitigate the basic constitutional evil of which petitioner complains —that children were included in the community *at all* in the jury's deliberations in a case in which the charged materials were distributed only to adults.

Where errors of constitutional dimension have occurred, the focus of review centers not only on a determination of whether the errors "contributed to the conviction," *Fahy v. Connecticut,* 375 U.S. 85, 86-87 (1963), but also on whether the prosecution has established "beyond a reasonable doubt," *Chapman v. California,* 386 U.S. 18, 24 (1967), that the errors were not prejudicial to the petitioner. Respondent has not met this heavy burden.

Respondent also relies on *Hamling v. United States, supra,* and *Smith v. United States,* 431 U.S. 291 (1977), in support of its contention that the trial court's references to "average person" sufficiently described the community whose standard is to be applied. However, neither *Hamling* nor *Smith v. United States, supra,* considered the issue of the composition of the community in the context of the instructions here at issue. Indeed, Justice Blackmun stated in *Smith* that "we hold only that the Iowa stat-

ute is not conclusive as to the issue of contemporary community standards. . . . " *Id.*, 431 U.S. at 308.

Respondent further suggests that likening the "average person" to the "reasonable man" in other areas of the law, *Hamling v. United States, supra,* 418 U.S. at 104-105, and *Smith v. United States, supra,* 431 U.S. at 302, somehow enhances respondent's position (Resp. Br. 20-21). The analogy, however, does not save the erroneous instructions. Even in those cases in which the "reasonable man" test is applied, the applicable standard is established according to the facts and circumstances appearing in the case. Thus, the standard of reasonableness against which the conduct of a child is viewed is not that which would be applicable to an adult, but rather to that of children of the same age as the child whose conduct is in issue. See, 2 F. V. HARPER AND F. JAMES, JR., THE LAW OF TORTS, 924-027 (1956). In this case, petitioner was not charged with mailing obscene materials to children and there is no evidence that children were recipients of any of the materials. The likening of the "average person" in the community to the "reasonable man" therefore, serves, if anything at all, to emphasize the necessity for the trial court to have excluded children from the jury's consideration on this record.

II. THE EVIDENCE WAS INSUFFICIENT TO WARRANT THE JURY CHARGE ON APPEAL TO DEVIANT SEXUAL GROUPS.

In his opening brief (Pet. Br. 39-45), petitioner urges that the record was insufficient to warrant the trial court's charge to the jury that the materials in issue could be found obscene upon its determination that the material appealed to the prurient interest of members of a deviant sexual group. As petitioner there notes, the court below held that, contrary to this Court's decision in *Mishkin v.*

New York, 383 U.S. 501 (1966), evidence of design and dissemination, as well as evidence which clearly defines the group was not a prerequisite to such charge, but that in any event such evidence does appear in the record.

Respondent's answer to this issue misconceives the thrust of petitioner's argument. Respondent dwells on the propriety of a charge on deviant appeal in a federal obscenity prosecution (Resp. Br. 27-30). Petitioner, however, has never taken issue with such a charge in the abstract. His point has been only that the record in this case was insufficient to justify such a charge by the trial court.

Instead of referring to evidence in the record showing design and dissemination to a clearly defined deviant group as a basis for the charge, respondent substitutes its own inferences from the materials themselves in an attempt to establish this evidence. In a boot-strap argument, respondent details the depictions in some of the exhibits, self-characterizes them as having "blatant appeal to such deviant sexuality" (Resp. Br. 31), and finally refers to the testimony of a rebuttal witness who testified that some of the material may appeal to deviants (Resp. Br. 33-34). This witness, Dr. James Rue, also testified that some of the material which he found had appeal to deviants, had appeal to normal persons as well (App. 34-41).

Respondent, however, has not pointed out any evidence in the record which serves to supply the necessary proof required by *Mishkin* to show that the material in issue was designed for and disseminated to a clearly defined deviant group.

Nor does respondent answer petitioner's contention that the charge as given failed to instruct the jury that

it must first find that the materials in issue were designed for and primarily disseminated to such deviant groups before it could consider the effect of the materials on the members of the group (Pet. Br. 45).

III. THE EVIDENCE WAS INSUFFICIENT TO WARRANT THE CHARGE ON PANDERING, WHICH CHARGE WAS ITSELF ERRONEOUS IN INSTRUCTING THE JURORS TO CONSIDER MATTERS NOT IN EVIDENCE.

Respondent attempts to refute petitioner's assertion that there was insufficient evidence in the record to warrant the district court's charge on pandering by resorting to examination of the exhibits received in evidence (Resp. Br. 36).*

No reference is made by respondent to testimonial evidence which discloses petitioner's methods of operation, circumstances of production and sale, the dimension of petitioner's business, or his instructions to authors or writers, all of which this Court has deemed essential to the giving of an instruction on pandering. *Ginzburg v. United States*, 383 U.S. 463 (1966); *Mishkin v. New York*, 383 U.S. 501 (1966); and *Hamling v. United States*, 418 U.S. 87 (1974).

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*Respondent dismisses petitioner's further suggestion that the vitality of *Ginzburg v. United States*, 383 U.S. 463 (1966), was diminished, if not completely destroyed, by *Virginia State Board of Pharmacy v. Virginia Consumer Council, Inc.*, 425 U.S. 748 (1976), by noting the affirmation of the pandering principle by a majority of the Court in *Splawn v. California*, 431 U.S. 595, 598 (1977) (Resp. Br. 35, fn. 21). However, the Court in *Splawn* did not expressly cite *Virginia Pharmacy* in its majority opinion, nor did the Court expressly address the issue presented by Justice Stevens in dissent. "Truthful statements which are neither misleading nor offensive are protected by the First Amendment even though made for a commercial purpose." *Splawn v. California, supra*, 431 U.S. at 602 (Stevens, J., dissenting).

The basis for allowance of a charge on pandering in an obscenity prosecution is bottomed on the premise that the materials themselves, standing alone, are not obscene. *Ginzburg v. United States, supra*, 383 U.S. at 465-466. It is only when the materials are viewed in the context of the defendant's business operation, methods of production and sale, as well as the other factors to which this Court has referred in the above-cited cases that such materials, otherwise not obscene under the law, can be found to be obscene. It is for this reason that *evidence* of pandering in an obscenity prosecution has been held relevant and therefore admissible. Petitioner urges that if the Government seeks to rely on pandering as a part of its case at trial, it should be required to introduce evidence of the kind and character that this Court has recognized to be evidence of pandering. And upon failure to produce such evidence, the material should be examined by the jury unaided by an instruction on pandering. The trial court's charge in this case, given without proper evidentiary support in the record, constituted prejudicial error.

It is finally noted that respondent offers no answer to petitioner's further contention (Pet. Br. 50-51), that in any event the district court's charge on pandering was error laden because the jury was instructed to consider the "setting", "manner of distribution, circumstances of production, sale and advertising" (App. 60), concerning which there was no evidence. The jury was thus permitted to resort to speculation as to these factors in reaching its verdict. *United States v. Breitling*, 20 How. 252, 254-255, 61 U.S. 252, 254-255 (1858).

IV. THE CONCURRENT SENTENCE DOCTRINE WAS ERRONEOUSLY APPLIED BY THE COURT OF APPEALS.

The district court's refusal to admit into evidence two comparable films, "Deep Throat" and "The Devil in Miss Jones," was assigned as error to the court of appeals (551 F.2d at 1161; Pet. App. 12a). Although that Court determined that the comparable films were similar to the prosecution film in issue, it declined to complete its determination of the issue of whether community acceptance of the films had been established, by invoking the concurrent sentence doctrine (551 F.2d at 1161; Pet. App. 14a).

Both in his petition for writ of certiorari and in his opening brief to this Court, petitioner has urged that the concurrent sentence doctrine was inapplicable and should not have been applied by the court of appeals (Pet. Br. 25-33). Respondent makes no response to the arguments advanced by petitioner that the doctrine was not applicable, but rather confesses error for having previously urged that the doctrine was properly invoked by the court below (Resp. Br. 40, fn. 25). Petitioner agrees with respondent. Although petitioner was sentenced to serve concurrent sentences, he was also fined $500.00 on each count, which fines were cumulative. Under such circumstances, the concurrent sentence doctrine is not applicable. *United States v. Allen,* 554 F.2d 393, 407 fn. 15 (10th Cir. 1977), *cert. denied,* ..... U.S. ..... (Oct. 3, 1977).

Petitioner therefore urges that the concurrent sentence doctrine was not applicable for both the reasons stated in its opening brief as well as for the reason noted by respondent. Petitioner does not oppose respondent's suggestion that this Court, rather than remand the case, consider the merits of petitioner's assertion of error resulting from the trial court's exclusion of the offered comparable films, because the record on this issue is complete. Moreover, in the event of remand of this case on other grounds, a decision from this Court on the comparison evidence issue will be instructive, avoid a recurrence of the issue at such retrial, and further the interests of judicial economy.

V. THE DISTRICT COURT ERRED IN EXCLUDING THE COMPARISON EVIDENCE.

The Court of Appeals determined that the two offered comparable films

> "bore a reasonable resemblance to the film 'No. 613' identified in count 9 of the indictment. . . ."
>
> "The three films were similar because they presented the same or similar sexual acts with an equal degree of explicitness." 551 F.2d at 1161 (Pet. App. 13a).

After further determination that the comparable films did not bear a reasonable resemblance to the material which formed the basis of the charges in the other counts of the indictment, the Court of Appeals abruptly terminated its review of the issue on its merits, by invoking the concurrent sentence doctrine.

Respondent argues not only that the comparable films were properly excluded with respect to those counts of the indictment not relating to film No. 613, but also, in disagreement with the finding of the Court of Appeals, further contends that the comparable films did not meet both parts of the test of admissibility established in *United States v. Jacobs,* 433 F.2d 932, 939 (9th Cir. 1970), and *United States v. Womack,* 509 F.2d 368, 377-378 (D.C. Cir. 1974) (Resp. Br. 42). That test requires that the proffered comparable evidence be shown to have (1) a reasonable resemblance to the charged material; and (2)

a reasonable degree of community acceptance. *United States v. Jacobs, supra,* 433 F.2d at 933. Petitioner contends that the comparable films satisfied the test for admissibility and were applicable both to the film charged in count number 9 and to the material charged in the remaining counts, which latter material depicted sexual activity in still rather than motion picture form.

With respect to reasonable resemblance, it cannot be denied that the comparable films depicted explicit sexual activity of the same kind, although perhaps not every kind, variety, frequency and vividness as that depicted in all of the charged materials. For one court's exposition of the depictions contained in "Deep Throat", see Respondent's Brief, p. 44, fn. 27. Surely that film No. 613 was in black and white and the offered films were in color should not be deemed such a dissimilarity as to justify their exclusion. Moreover, the photographs in "Bedplay", as to which the comparable films were also offered as comparison evidence, were in color. The comparable films were offered for the purpose of demonstrating to the jury "contemporary community standards." They went to the very essence of petitioner's defense and constituted the "best evidence," *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 56 (1973), and the best means petitioner had to show that standard to the jury.

It was not essential that the comparable films be identical in every respect to the materials charged, but merely that they bore a reasonable resemblance to the charged material with respect to the explicit depiction of sexual activity. If the offered films had been received in evidence, it would have been the jury's function to consider the comparable films as a factor in determining community standards, along with the other evidence.

Respondent argues that the comparable films depicted acts in a different form and context from the charged material (Resp. Br. 42-43). But the expression is the same no matter whether the form is still photos or motion pictures. In the law of obscenity, there is no distinction "as to the medium of expression." *Kaplan v. California,* 413 U.S. 115, 119 (1973).

With respect to community acceptance of the comparable films, petitioner submits that a stronger case for the showing of the community acceptance of these films can hardly be imagined. A witness was permitted to testify that these films were rated first and third of the most successful films in the community. Although evidence of gross revenues was presented, these figures were not introduced for the purpose of showing the commercial profit resulting from public exhibition of the films, but rather for the purpose of demonstrating the massive public acceptance of these films. This evidence disclosed that more than one-half million people in the Los Angeles area saw "Deep Throat" and more than 240,000 persons viewed "The Devil in Miss Jones." The proof of reasonable community acceptance here was far more substantial than a showing of "mere availability," cf. *United States v. Manarite,* 448 F.2d 583, 593 (2nd Cir. 1971), or that the material was within the standards of "the Block", that is, that the material enjoyed no distribution other than through small book stores clustered in a particular area of a city. *United States v. 392 Copies of Magazine "Exclusive",* 253 F. Supp. 485, 496 (D. Md. 1966), *aff'd,* 373 F.2d 633 (4th Cir. 1967).

The point here in issue narrows to the question of what degree of proof of "community acceptance" is required of a defendant in an obscenity prosecution so as to permit the admission of comparison evidence. Respondent urges this Court to determine that community acceptance is suffi-

ciently demonstrated by the showing of vast public viewing of the comparable films or reading of printed materials over an extended period of time. A defendant should have no greater burden than the production of probative evidence of such facts. If, upon such showing, the prosecution denies that community acceptance has been proved, the burden of proving non-acceptance should then rest with the prosecution. In the case before this Court, respondent offered *no* evidence to refute the clear showing of community acceptance of the offered films. Respondent's statement of reasons as why the films were not accepted in the community (Resp. Br. 43-44) are mere suppositions having no foundation or support in the record.

That "Deep Throat" was found to be obscene in other parts of the country, as respondent well notes, is of no controlling effect on the community in which venue was set for the prosecution of this case. This is especially so where several prosecutions of this film in the community itself resulted in acquittals (Resp. Br. 45, fn. 29).

Respondent finally argues that petitioner was not denied due process by the exclusion of the films because he was permitted to present other witnesses who testified on community standards (Resp. Br. 46). Testimonial proof of community standards elicited from a witness is not the same as, nor should it be equated with, demonstrative evidence of those standards about which those experts testified. Respondent does not argue that the comparison evidence was cumulative.

The trial court's refusal to admit the offered comparable films constituted prejudicial error.

CONCLUSION

For the reasons stated in his opening brief and upon the authorities and argument presented in this reply brief, petitioner respectfully urges the Court to reverse the decision of the court below.

Respectfully submitted,

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